

LEGAL ASPECTS OF PUBLIC ENTERPRISE IN INDIA AND TANZANIA:
A COMPARATIVE STUDY

A Thesis submitted to the University
of London for the award of the Degree
of Doctor of Philosophy in Law

by

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AN ABSTRACT

This thesis compares the legal aspects of public enterprise in India and Tanzania, with references to the United Kingdom. It considers the politico-economic philosophy adopted and practised by each country and the role of public enterprise in the pursuance of this philosophy. The study relates to statutory and public corporations and government companies under the Indian Companies Act and the Tanganyika Companies Ordinance, respectively. The composition, functions and powers of the boards of management are examined and the present methods of control in form and content are reviewed. The thesis also examines the relative role of statutory controls, direct controls by the Government, and indirect controls through public agencies. It considers the relationships of the boards of corporations and government companies with Ministers, and considers the various pressures which have been brought to bear upon these institutions. It examines the methods which have been invoked to establish the accountability of the public enterprises to Parliament. It has tried to strike a sensible balance between the need for autonomy and the need for effective public control.

The emphasis of the thesis has been on ministerial control as well as on Parliamentary control. The question of audit by the Comptroller and Auditor-General and the working of a Parliamentary Committee has also been discussed.

Although the Statutes and Orders creating statutory and public corporations in both countries reveal that the principle of direct representation of workers has been completely ignored, this thesis finds it relevant to discuss the idea of workers' participation in management in the light of present economic conditions. It examines the nature and extent of workers' participation in management, however popular as a philosophical value in the public sector, its applicability ought to depend on the objective conditions of an individual enterprise.

The thesis concludes that, in order to maintain and improve the public enterprise, it will be necessary to clarify the fundamental principles of the institution. It also makes a comparative analysis between Indian and the Tanzanian public enterprises. It suggests that legislation should clarify the legal relationship between the Boards, Ministers and Parliament.

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ACKNOWLEDGEMENT

Research work requires years of perseverance, patience and enthusiasm. At some point, however, a researcher loses his direction and encounters for him intractable problems, especially when he is surrounded by masses of factual information. He then desperately needs help, guidance and encouragement to overcome these problems. I am no exception. This work could not have been complete without the help, guidance, direction and above all, the encouragement of Professor J.S. Read. It is my pleasant duty, therefore, to express my sincere gratitude and thanks to him. His supervision has been immensely valuable to me and I am quite aware that this acknowledgement is hardly adequate. It is also my duty to record my thanks to Dr. T.K.K. Iyer, who was my joint Supervisor for some time, for his help and assistance.

I wish to thank the Library Staff at the School of Oriental and African Studies, the Institute of Advanced and Legal Studies, the Institute of Commonwealth Studies, the British Museum, the Goldsmiths Library of the London University, the Foreign and Commonwealth Office, the Colindale Newspaper Library, Mr. Mugwaja, Information Officer at the High Commission of Tanzania, and Mr. Peter Hain, Research Officer of the Union of Post Office Workers for their able assistance.

My thanks are also due to Mrs. P. Rivere, Secretary of the Department of Law at S.O.A.S., for her pleasant manners and her readiness to help solve any problem concerning this study. For the excellent typing done so quickly and cheerfully by Mrs. M. Baker, I thank her as well.

Last, but by no means least, I wish to thank my wife for her encouragement and her willingness to look after our two small daughters single-handed during my absence far away from home.

AMIT SEN,
London

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ABBREVIATIONS

A.C.	Appeal Cases
A.I.R.	All India Reporter
Com. Cases	Company Cases
C.L.J.	Company Law Journal
K.B.	Kings Bench
S.C.	Supreme Court
S.C.C.	Supreme Court Cases
W.L.R.	Weekly Law Reports. (London)

CHAPTER 1

LEGAL ASPECTS OF PUBLIC ENTERPRISE IN INDIA AND TANZANIA:
A COMPARATIVE STUDY

NATIONAL GOALS

The literal and logical interpretation of any Statutes and the decision on the legality of any measures are mainly the province of the lawyer. However, the lawyer is ill-fitted as compared with the political scientist, to investigate the areas between the statement of the aim and the measurement of the impact of the policy; that is the on-going means by which policies are formulated and the processes by which they are implemented. Consequently, the intention of this section is to outline the declared political ideology and social philosophy adopted and practised by both India and Tanzania as well as their recent attempts to implement the goals of their respective Constitutions.

Some Political and Economic Assumptions behind the Constitution

1.1. India

India has committed itself to the creation of a "socialist pattern of society". No where in the Indian Constitution, which comprises 395 articles and 9 schedules and is known to be the lengthiest Constitution in the world, has this expression found a definite place. It has been used in a document called 'The Industrial Policy Resolution of 1956' which set out the industrial strategy of the government. But it cannot be denied that the idea of building a 'Socialist Society' was always very dear to the hearts of the founding fathers of modern independent India.

The Indian Independence Act of 1947 passed by the British Parliament provided for the handing over of power to an Indian Constituent Assembly which was regarded ^{as} sovereign for the purpose of framing a Constitution for India on 15 August, 1947. Until the new State worked ^{out} her Constitution, the Government of India Act, 1935, would remain in force without the special powers granted by it to the Governor-General. Though the present Constitution was modelled on the 1935 Act and has borrowed over 100 articles from it, some provisions of the Act were unacceptable and distasteful to the Indian leaders.

The Constituent Assembly which was led by men of experience and

erudition, was entrusted with the task of framing an autochthonous ¹ Constitution. The foundation of the Constitutional structure of the Assembly was laid by the Objectives Resolution ² moved by Jawaharlal Nehru. It said (Inter alia):

- (1) The Constituent Assembly declares its firm and solemn resolve to proclaim India as an independent sovereign Republic and to draw up for her future governance a Constitution;
- (2) Wherein shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality.

1. An Autochthonous Constitution is one which is rooted in its own native land and its authority comes from the people but from nowhere else. This has been explained clearly by K.C. Wheare in "The Constitutional Structure of the Commonwealth". In his words: "They (people) wish to be able to say that their Constitution has a force of law and, if necessary, of supreme law within their territory through its own native authority and not because it was enacted or authorised by the Parliament of the United Kingdom; that it is, so to speak, 'homegrown', sprung from their own soil, and not imported from the United Kingdom. They assert not the principle of autonomy only; they assert also a principle of something stronger, of self-sufficiency, of Constitutional autarky or to use a less familiar but accurate word, a principle of Constitutional autochthony*, of being constitutionally rooted in their own native soil." Page 89.

* From the Greek word 'αὐτοχθόν' - 'sprung from that land itself' (OED). See London University thesis by O. Achtmann, "Autochthony & its implications", 1972.

2. Constituent Assembly Debates, 13 December, 1946, Volume I, page 57.

The inspiration behind the new Constitution was two-fold: the principles of 'Western democracy' and, in particular, the British Parliamentary system; and the teachings of Mahatma Gandhi. Gandhi's influence is seen in the decision to make the new India a 'Secular State',³ based on the classic civic freedoms and not on the structure of the Hindu religion.

The ideals Nehru held were incorporated at his insistence in the Directive Principles of State policy in Article 39 of Part IV of the Constitution. These principles include the obligation to ensure:

- (a) that the Citizens, men and women equally, have the right to an adequate means of livelihood;
- (b) that the ownership and control of the material resources of the Community are so distributed as best to subserve the common good;
- (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The Directive principles are not enforceable but are intended as a guide to government action. In fact, they indicate the social and economic goals of the nation.

The Constituent Assembly intended that the new Constitution should foster India's rebirth.⁴ Nearly every one in the Assembly was Fabian and Laskite enough to believe that "Socialism is every day politics for social regeneration,⁵ and that 'democratic constitutions are ... inseparably associated with the drive towards economic equality."⁶ The Constituent Assembly in the Objectives Resolution and the debate on it, established that the Constitution must be dedicated to some form of Socialism and to the social regeneration of India, and has agreed with the Congress Socialist Party's resolution of 1947 stating that "there could be no Socialism without democracy".⁷

The Constituent Assembly has also accepted certain fundamental concepts as being vitally essential for maintaining the stability and progress of the country, and attempted to devise a political machine which would make it possible to give practical effect to those concepts and ideals.

On 26 November, 1949, the Constituent Assembly, in the name of the people of India, adopted and enacted the Constitution, and it came into force on 26 January, 1950. Granville Austin's comment on the type

4. Granville Austin: The Indian Constitution: Cornerstone of a Nation, page 41.

5. M. Beer: A History of British Socialism, page 281.

6. A.J. Laski: A Grammar of Politics, p. 33

7. Resolution adopted at Kanpur Conference on 28 February, 1947. The above paragraph containing notes 4 to 7, has been quoted from Austin's "Indian Constitution," page 41.

of Constitution the Assembly has created, was as follows:

What was of greatest importance to most Assembly members, however, was not that Socialism be embodied in the Constitution, but a democratic Constitution with a socialist bias so as to allow the nation in the future to become as socialist as its Citizens desired or its need demanded. Being, in general, imbued with the goals, the humanitarian bases, and some of the techniques of social democratic thought, such was the type of Constitution that Constituent Assembly members created.⁸

However, the Constitution of India cannot be strictly classified as either Capitalistic, Socialistic or Communistic.⁹ It is democratic in character and it reflects the wishes, the hopes and the aspirations of the people of India. The Constitution, it could be said, is a mixture of idealistic social and economic provisions with articles of a practical, administrative and technical nature.

8. G. Austin: Indian Constitution - Cornerstone of a Nation, op.cit., page 43.

9. These terms refer to a social system which a Constitution wishes to establish:
Capitalistic: A social system in which the means of production, distribution and exchange are wholly or substantially owned by private persons.
Socialistic: ... the means of production, distribution, and exchange should be owned and controlled by the people, everyone should be given an equal opportunity to develop his talents, and the wealth of the community should be fairly distributed.
Communitic: ... type of system in which property is vested in the community, every individual receiving what he needs and working according to his capacity.

The ideals and objectives of the Constitution are enshrined in the inspiring words of the Preamble to the Constitution. It reads:

We, the people of India, having solemnly
resolved to constitute India into a sovereign
Democratic Republic and to secure to all its
Citizens:
JUSTICE, social, economic and political;
LIBERTY of thought, expression, belief,
faith and worship;
EQUALITY of status and of opportunity;
and to promote among them all
FRATERNITY assuring the dignity of the
individual and the Unity of the Nation.

It is admitted that the Preamble is not considered to be the operative part of the Constitution as it does not confer any power or create any authority. It broadly indicates the purpose and objects that it seeks to achieve and the inconveniences that it strives to eradicate. The significance of the Preamble has never been denied. At times it plays a decisive role in the interpretation of the law and the Constitution. If the language of the articles and clauses are found to be conflicting and ambiguous, then a reference could be made to the Preamble because it contains a recital of the intentions of those who framed the law and can, therefore, supply a sort of key to the understanding of ideals which do not seem to be precisely expressed. Professor Willoughby, an eminent Constitutional lawyer, put a great emphasis on this idea and said that the "Preamble may not be relied upon for giving to the body of the instrument a meaning other than that which its language plainly imports, but may be

resorted to in cases of ambiguity, when the intention of the framers does not clearly and definitely appear." ¹⁰

The same sentiment has been echoed in the case of Bhola Prasad v. King Emperor, ¹¹ where it was said: "The Preamble of a statute is a key to open the mind of the makers as to mischief which are to be remedied, and the objects which are to be accomplished by the provisions of the statute."

A detailed account of basic human rights and ambitions of the Indian society are incorporated in the chapters on Fundamental rights and Directive principles of state policy. They are included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India. ¹²

The Directive Principles of State policy pronounced in Articles 36 to 51 of the Constitution, define clearly the Welfare State and visualize the economic and social pattern of life to be achieved through proper planning. These principles are fundamental in the governance of the country. ¹³ But the essence of the Directive principles is found in Article 38, which,

10. W.W. Willoughby: Principles of the Constitutional Law of the U.S., 2nd Edn. (1938), page 43.

11. 1942 , 46 C.W.N. (F.B.), page 37.

12. G. Austin: Indian Constitution, page 50.

13. Article 37 of the Constitution.

echoing the Preamble, reads: "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the national life." As mentioned earlier, the Directive principles have moral rather than legal force. It is expected that any measure to give effect to these principles would invite a conflict between a fundamental right and a directive principle. As early as 1951, the Supreme Court said in one of its decisions that these principles have to conform to and run subservient to the fundamental rights.¹⁴ Nevertheless, the present attitude of the Indian judiciary towards these principles, is to take cognizance of these socio-economic objectives in the interpretation of the articles of the Constitution. In the case of Chandra Bhavan Boarding and Lodging Bangalore v. The State of Mysore & Ors,¹⁵ the Supreme Court observed:

Freedom of trade does not mean freedom to exploit. The provisions of the Constitution are not erected as barriers to progress. They provide a plan for orderly progress towards the social order contemplated by the Preamble to the Constitution. They do not permit any kind of slavery, social, economic or political. It is a fallacy to think that under our Constitution there are only rights and no duties. While rights conferred under Part III are fundamental, the directives given

14. State of Madras v. Champakam Dorairajan, A.I.R. 1951 S.C. 228.

15. 1970 2 S.C.R., page 612, paras. B to E.

under Part IV are fundamental in the governance of the country. We see no conflict on the whole between the provisions contained in Part III and Part IV. They are complementary and supplementary to each other. The provisions of Part IV enable the legislature and the government to impose various duties on the citizens. The provisions therein are deliberately made elastic because the duties to be imposed on the citizens depend on the extent to which the directive principles are implemented. The mandate of the Constitution is to build a welfare society in which justice, social, economic and political, shall inform all institutions of our national life. The hopes and aspirations aroused by the Constitution will be belied if the minimum needs of the lowest of our citizens are not met.

The conflict of judicial opinion as to the place of directive principles vis-à-vis fundamental rights is now finally settled by the Twenty-fifth Constitution (Amendment) Act, 1971. It declares that a law enacted for the purpose of implementing any of the directive principles stated in clause (b) and (c) of Article 39 shall not be called in question in any court on the ground that it is inconsistent with Articles 14, 19 and 31.

In the Chapter on Fundamental rights, the Articles 19, 20, 21, 22, 23 and 24 have been placed under the caption "Right to Freedom". Article 19 expressly recognises the following seven rights: (i) right to freedom of speech and expression; (ii) right to assemble peacefully and without arms; (iii) right to form associations or unions; (iv) right to move within the territory of India; (v) right to reside and settle in any part of the territory of

India, (vi) right to acquire, hold and dispose of property; and (vii) right to practise any profession or to carry on any occupation, trade or business. However, the Constitution also recognises that no fundamental right is absolute and each is subjected to the reasonable restrictions imposed under the authority of clauses 19 (2) to 19 (6) of the article in the interest of the integrity of India, security of the State, public order, etc.

These political and economic rights have been jealously protected by the Indian judiciary from any encroachment, and these rights have been variously described by it as paramount,¹⁶ sacrosanct,¹⁷ inalienable and inviolable,¹⁸ and transcendental.¹⁹ But as the government activity in the economic field has increased in order to fulfil its socio-economic commitments, the clash between the individual and the State has become inevitable. Moreover, the State intervention is also considered essential in the sphere of social welfare on account of fear that without it social injustice will be accentuated. This situation imposes a heavier responsibility on the Indian judiciary as the ultimate arbiter of the provisions of the Constitution. It seems that judicial

16. A.K. Gopalan v. State of Madras, 1950 S.C.R., page 198.

17. State of Madras v. Champakam Dorairajan, 1951 S.C.R., page 825.

18. Ujjam Bai v. State of U.P., 11 A.I.R. 1962, S.C. 1621.

19. Golak Nath v. The State of Punjab, A.I.R. 1967 S.C. 1643.

thinking on this point has undergone a change. In Sajjan Singh v. State of Rajasthan,²⁰ Mr. Justice Mudholkar has been confronted with "an argument that if fundamental rights are regarded as unchangeable it will hamper legislation which the changing needs of a dynamic society may call for in future." He said that :

It is possible that there may be an answer. The rights enumerated in article 19(1) can be subjected to reasonable restrictions under clauses (2) to (6) of article 19 and the other fundamental rights - or at least many of them - can perhaps be adopted to meet the needs of a changing society with the aid of the directive principles. For, article 37, the second article in Part IV which deals with 'directive principles' of State policy' imposes a duty on the State to apply those directive principles in making laws. These principles are also fundamental in the governance of the country and the provisions of Part III of the Constitution must be interpreted harmoniously with those principles.

In Golak Nath v. State of Punjab,²¹ the Supreme Court pronounced that the fundamental rights could not be taken away or abridged by means of amendment. In the above case, Chief Justice Subba Rao observed that the Constitution was flexible enough to accommodate future socio-economic

20. A.I.R. 1965 S.C. 864.

21. A.I.R. 1967 S.C. 1643.

change without a formal amendment restricting the fundamental right.²²

The recent decision in Kesavananda's case²³ has empowered Parliament to amend each and every article of the Constitution by way of addition, variation, or repeal, so long as its fundamental features are not abrogated.

As long as this decision holds good, the government is ensured a smooth ride in Parliament if and when an occasion would arise to by-pass or override any provisions of the Constitution in order to achieve the objectives mentioned earlier.

The ruling party is the political machine through which the ideals and objectives laid down in a Constitution are implemented. If the aims and goals of the party are in conflict with the goals of the Constitution, the latter becomes ineffective and inoperative. In other words, it loses its authority and force. But ^{until March, 1977} from Independence, India has been governed by a single party, the Indian National Congress, and its declared objectives are in line with the spirit of the Constitution. As early as January, 1955, the Congress party has accepted 'Socialism' as the party creed at a Party Conference at Avadi and ^{this} was reiterated at Bhubaneswar in 1964 when the Party declared that :

22. Id. at 1670.

23. Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1476.

the object of the Indian National Congress is the well being and advancement of the people of India by peaceful and constitutional means, of a Socialist State based on parliamentary democracy in which there is equality of opportunity and of political, economic and social rights and which aims at world peace and fellowship. 24

The elimination of exploitation, the putting an end to unemployment, the bringing of the opportunity for every individual to get the education suited to his capacity, all these are items in the Socialist programmes which Indian Socialism is committed to promote and provide.

Jawaharlal Nehru, an ardent believer of Socialism, wrote in an article that "It is only through a planned approach on Socialist lines that steady progress can be attained though even that will take time. As this process continues, the texture of our life and thinking gradually changes." 25

The long journey on the road to social and economic progress which the people of India began under the charismatic leadership of Prime Minister Nehru was continued under the Stewardship of Prime Minister Mrs. Indira Gandhi. Mrs. Gandhi believed that the existence of poverty is incompatible with the vision of a prosperous, democratic and just society implied in

24. Quoted from Birch and Cole: Asian Political System, page 272.

25. J. Nehru: The Basic Approach, Economic Review, 15 August, 1958.

the concept of a Socialist pattern of society. With a view to establishing such a society, she announced the 20-Point New Economic Programme on 1 July, 1975, to ensure social justice, to relieve unemployment and to eradicate poverty. The 20-Point Economic Programme has been considered as a step forward in a new era for the poor and the destitute. The following are the 20-Points that make up this Programme:

- Point 1: Meeting the challenge on the Price front. Steps are to be taken to stimulate production, speed up procurement and streamline the distribution of essential commodities to check the price-rise.
- Point 2: Effective land reforms and distribution of surplus land among the landless.
- Point 3: Home-sites to landless labourers.
- Point 4: Banning of bonded labour. The barbarous practice of bonded labour will be abolished and all contracts relating to such practice will be declared illegal.
- Point 5: Liquidation of rural indebtedness.
- Point 6: Enhanced minimum wages for agricultural labourers. The existing legislation (i.e. Minimum Wages Act, 1948) on minimum wages for agricultural labour is to be reviewed for suitable enhancement of minimum wages.
- Point 7: Expansion of irrigation facilities.
- Point 8: Greater supply of electric power.

- Point 9: Special measure for development of handlooms.
- Point 10: More adequate supply of controlled cloth.
- Point 11: Regulation of private ownership of urban land. It is now proposed that Government should have the power to acquire all vacant land in excess of a ceiling (usually 500 sq.metres) after payment of a certain compensation to the present owners.
- Point 12: Checking of tax evasion in respect of urban property.
- Point 13: Intensification of measures to check smuggling. Special laws are to be enacted for the seizure of smugglers' property.
- Point 14: Liberalisation of industrial licences.
- Point 15: Greater participation by workers in industrial management. Schemes for workers' participation in the industries, particularly at the shop floor level and production programmes, will be introduced. Joint Worker-Management Councils will be introduced in each department of a large factory.
- Point 16: National permits for road transport operators.
- Point 17: Income tax exemption for people with moderate incomes.
- Point 18: Relief for poor students who reside in hostels outside statutory rationing areas.
- Point 19: Provision of textbooks and writing materials to students at concessional rates.

Point 20: Widening the scope of the Apprenticeship Act to provide employment-oriented training facilities to educate young men; the provisions of the Apprenticeship Act, 1950, are to be suitably amended.

It cannot, however, be denied that some progress had been made since the introduction of the 20-Point Programme. There was a fall in retail prices and an increase in the annual growth rate. "An atmosphere of self-confidence now prevails among the people. There is improved discipline and better performance in all walks of life", says the Statesman.²⁶

But before the programme could be fully implemented, the Congress Party, under the leadership of Mrs. Gandhi, suffered a crushing defeat in the hands of the Janata Party, which was formed by the amalgamation of the five²⁷ major *opposition* parties, at the general elections of March, 1977. Some observers feared that certain socialist programmes would be abandoned by the present government as the political philosophies advocated by the five parties, before the merger took place, ~~were~~ diametrically opposite to each other. This fear has no doubt caused anxiety and uncertainty. In order to clear the air of uncertainty, the Minister of Industry, George Fernandes, issued a

26. "The Statesman", 10 October, 1976.

27. The Satwantra party, the Jan Sangha, one faction of the Congress Party, Congress for Democracy and the Socialist Party.

statement saying that "the future economic policy of the present government will be in conformity with the Industrial Policy Resolution of 1956".²⁸

This statement may be interpreted as an intention of the present Government to pursue the same economic policy where the public sector will play a dominant role in the management of the economy, and also a rebuff to some members of the government who passionately advocated the free economic system to help solve the present economic stagnation.

However, it would be premature to comment on the activities and intention of the Janata Party now as it has a long way to go.

28. 'The Statesman', 31 December, 1977.

1.2. Tanzania

An attempt will now be made to throw some light on the ideals and objectives which the Tanzanian Constitution seeks to achieve.

Tanzania consists of Tanganyika and Zanzibar. The two countries joined together to form the United Republic of Tanzania on 25 April, 1964.

Tanganyika was a German colony from 1884 to 1918, and was administered by the United Kingdom under a League of Nations Mandate until 1946, and under United Nations Trusteeship until it attained independence in 1961.

Zanzibar was formerly a Sultanate and British Protectorate off the coast of Tanganyika, and became fully independent on 9 December, 1963.

Tanganyika became independent on 9 December, 1961, under a "Westminster model"²⁹ type of Constitution. The Constitution which

29. The main features of the model are: (i) Head of the State is not the effective head of government; (ii) the effective head is a Prime-Minister; (iii) the effective executive branch of government is parliamentary; (iv) Ministers must be members of the legislature; (v) Ministers are collectively and individually responsible to a freely elected and representative legislature. See for this, S.A. de Smith: The New Commonwealth and its Constitutions.

came into effect on that day, was in many respects the "standard" ³⁰ form" Constitution, but without a Bill of Rights, evolved in and produced by the Colonial Office, in consultation with the country concerned, for countries achieving independence within the Commonwealth. ³¹

In less than ten months after independence, the Tanganyikan National Assembly passed a resolution for a republican Constitution with an executive President who was both head of State and head of government. A new republican Constitution was enacted and came into effect on the first anniversary of independence on 9 December, 1962.

In accordance with the recommendations of a Presidential Commission set up in February, 1964, a new Interim Constitution ³² was passed by the National Assembly on 8 July, 1965, making Tanzania a one-party state. The Constitution declares that "there shall be one political party in Tanzania". ³³ The striking innovation is that the Constitution of Tanganyika African National Union (TANU) recently renamed the Revolutionary Party, the single party in Tanganyika, is set out in the First

30. S.I. 1961 No. 2274, Schedule II.

31. J. McAuslan: The Republican Constitution of Tanganyika,
[1964] *ICLQ* 502

32. Act No. 43 of 1965.

33. S.3(1) of the Constitution.

Schedule to the Interim Republican Constitution.

The recommendations of the Presidential Commission were included in the Interim Constitution, approved by the National Assembly on 8 July, 1965. In summary, the Commission's study:

1. Opened TANU membership to all Tanzanian citizens who adhered to the party's principles and sought to make of the party a truly national movement;
2. rejected the proposed amalgamation of the TANU National Executive and the National Assembly but changed the composition of the National Assembly and the method of its election and thus achieved a closer association between the Executive Committee and the National Assembly;
3. recommended that all members of the National Assembly be members of TANU;
4. determined that three (later changed to two) candidates for parliamentary seats and local offices be put forward to voters, these candidates chosen by district committees and countersigned by the National Executive;
5. decreed that all members of Parliament be designated ex-officio delegates to annual party conventions and that the Central Committee supervise work of both party and Parliament;
6. determined that all ministers and junior ministers be made members of the National Assembly;
7. designated the National Executive of TANU on the mainland and the Afro-Shirazi Party on Zanzibar to put forward one candidate for president and that name would be approved by ^{the}electorate with ^a"yes" or "no"

vote on the same day that parliamentary elections take place. If the majority voted "No" an alternative name was to be set forth;

8. required^a presidential as well as^a parliamentary election to follow upon any dissolution of *Parliament*;
9. provided for selection of a new president, in event of the death of the incumbent, by the National Assembly sitting as an "electoral college";
10. provided that the Civil Servants be permitted to join TANU and made members of the National Assembly if so nominated by the president;
11. Co-ordinated work and membership of the National Executive and local authorities but made TANU and local authorities separate and distinct authorities;
12. decreed that relations between party and trade unions be co-ordinated but the trade unions be subordinate to party and government. 34

In effect, the party has become the main instrument to bring about any political, economic and social change. The Interim Constitution sanctions much political power to TANU. TANU is empowered to nominate the president, to approve the vice-presidential candidate, and to select the elective candidates for each national assembly seat. Government officials are to take into consideration the party demand. Cabinet ministers must have the membership of the TANU National Executive and

34. W.R. Duggan & J. Civile: Tanzania & Nyerere, page 87.

of the Central Committee. Almost all important party members are also members of the National Assembly. TANU effectively controls leadership of trade union, youth, and women's groups, as well as the news media. Thus, TANU completely dominated the government and the people. With regard to TANU's position and role, Duggan and Cottle³⁵ have this to say:

Within Tanzania today, TANU is politically all-powerful and as such is expected to be a principal agent of change. Its militancy, its direction, its goals - all are controlled completely by Nyerere and his principal lieutenants operating through their combined guidance of National Executive and National Assembly. Furthermore, an interlocking directorate operating at national, regional, and local levels makes National Assembly action and implementation a concomitant of party action. Since it is now recognized constitutionally as the only legal political party on the mainland, TANU becomes also the primary instigator of governmental policy in social, economic, and political fields. TANU also serves as what Nyerere chooses to call a 'two-way street' encouraging free flow of ideas to and fro between bureaucracy and public. TANU today is considered to be one of the best-organized, as well as most powerful, political parties in all Africa.

But the question is: Can democracy exist in a one-party system? Nyerere believes that where there is one-party system, the foundations of democracy can be firmer and the people can have more opportunity for a real

35. Ibid., page 54.

choice than in a system of two or more parties each representing sectional interests.³⁶ In a two-party state the people are voting only for the party policy, not the individual who will represent them.³⁷ He goes on to say that the one-party state is more in accord with traditional tribal methods of conducting affairs, namely the elders sat under a tree and talked until they agreed.³⁸ When the word 'government' was mentioned, the African thought of the chief; he did not, as does the Briton, think of a grand building in which a debate was taking place.³⁹ The important thing today is that the people are free to elect their personal representative.⁴⁰ In fact, Nyerere sees a two-party state in a classless society as eventually being fatal to democracy.⁴¹ He also maintains that the one-party system is helpful to bring about a change of top leadership without recourse to violent means.

"Perhaps that change of top leadership is one advantage of our single-party system. If our party people felt that the top leadership

36. J.K. Nyerere: Freedom & Unity, page 200.

37. J.K. Nyerere: Freedom & Socialism, page 75.

38. J.K. Nyerere: Freedom & Unity, page 195.

39. J.K. Nyerere: *ibid.*, page 105.

40. J.K. Nyerere: Freedom & Socialism, page 19.

41. J.K. Nyerere: *ibid.*, page 20.

should go, it will go! You can't call it treason. Some of our earlier leaders have gone. I could go at any time. It would not be regarded as treason." ⁴² However, our observation is that democracy is working and will continue to work in Tanzania as long as Nyerere remains at the apex of the leadership pyramid. If his successor lacks his charisma and sagacity, then it will be a difficult question to answer. We also completely agree with Duggan & Civile when they say that "TANU, not the government, is the real center of power and decisions, and will continue to build a Socialist State". ⁴³

Now, we pay our attention to the provisions of the Interim Constitution. The Preamble of the Republican Constitution is a grand declaration of the ideals and objectives which the Tanzanian people have set before themselves and have the ambition to realise through the instrumentality of the political structure which they have deliberately created for themselves. It reads:

Whereas freedom, justice, fraternity and concord are founded upon the recognition of the equality of all men and of their inherent dignity, and upon the recognition of the rights of all men to protection

42. P. Enaharo: "African Socialism", Africa, 6 April, 1962, page 61.

43. Duggan & Civile: Tanzania & Nyerere, op.cit., page 196.

of life, liberty and property, to freedom of conscience, freedom of expression and freedom of association, to participate in their own government, and to receive a just return for their labours:

And when men are united together in a community it is their duty to respect the rights and dignity of their fellow men, to uphold the laws of the state, and to conduct the affairs of the state so that its resources are preserved, developed and enjoyed for the benefit of its citizens as a whole and so as to prevent the exploitation of one man by another:

And whereas such rights are best maintained and protected and such duties are most equitably disposed in a democratic society where the government is responsible to a freely elected Parliament representative of the people and where the Courts of law are free and impartial.

The Interim Constitution, unlike the Indian Constitution, does not incorporate a justiciable bill of rights. It is a framework within which the government and the party can operate more or less freely in their self-imposed task of national mobilisation.⁴⁴

Article II of the Constitution of TANU sets out the following political, social and economic objectives:

- (a) To consolidate and maintain the independence of this country and the freedom of its people;

44. S.A. de Smith: Constitutional & Administrative Law, page 28.

- (b) To safeguard the inherent dignity of the individual in accordance with the Universal Declaration of Human Rights;
- (c) To ensure that this country shall be governed by a democratic socialist government of the people;
- (d) To co-operate with all political parties in Africa engaged in the liberation of all Africa;
- (e) To see that the Government mobilize all the resources of this country towards the elimination of poverty, ignorance and disease;
- (f) To see that the Government actively assists in the formation and maintenance of co-operative organisations;
- (g) To see that wherever possible the Government itself directly participates in the economic development of this country;
- (h) To see that the Government gives equal opportunity to all men and women irrespective of race, religion or status;
- (i) To see that the Government eradicates all types of exploitation, intimidation, discrimination, bribery and corruption;
- (j) To see that the Government exercises effective control over the principal means of production and pursues policies which facilitate the way to collective ownership of the resources of this country;
- (k) To see that the Government co-operates with other States in Africa in bringing about African Unity;

- (1) To see that the Government works tirelessly towards world peace and security through the United Nations Organisation.

It is evident from the above objectives that Tanzania has adopted the establishment of an African-style Socialist society as her national goal. African Socialism is distinguished from Capitalism which seeks to build a happy society on the basis of exploitation of man by man; and it is equally opposed to doctrinaire socialism which seeks to build its happy society on a philosophy of inevitable conflict between man and man.⁴⁵ Nyerere goes on to elaborate that:

In a country like ours, development depends primarily on the efforts and hard work of our own people and on their enthusiasm and belief that they and their country will benefit from whatever they do. If the people do not have the reason to believe that the object of their government is the well-being of the people as a whole, why should they be expected to co-operate with that government in its activities?

In African society in particular this is very important. Traditionally, we lived as families, with individuals supporting each other and helping each other on terms of equality. We recognized that each of us had a place in the community, and this place carried with it rights to whatever food and shelter was available in

45. Ujamaa: The Basis of African Socialism, Nyerere, page 8.

return for the use of whatever abilities and energies we had ... But the community was a unit in which every individual was important, and among which the goods available were shared without too great inequality.

This attitude is, basically, what we mean by saying that traditionally African society was a socialist society. And when we say that Tanzania is aiming at building 'African Socialism' we mean that we intend to adopt the same attitude in the new circumstances of a nation state which is increasingly using modern techniques of economic production ... But the purpose remains the same as in the traditional society. That is, the welfare of every individual in the context of the needs of the society of which he is a member ...

If our determination to pursue this objective annoys some people who might otherwise have assisted us in our economic development, what are we supposed to do? Abandon our objective? 46

The foundation and objective of African socialism is the extended family.

All men are regarded as brethren - as members of an ever-extending family.

It does not follow any particular pattern - it is neither Marxism, nor Leninism

or Maoism - it is an exclusive system which is particularly suited to Tan-

zania.⁴⁷ President Nyerere believes that "Ujamaa" is African socialism

46. Quoted from Duggan & Civile: Tanzania & Nyerere, page 90.

47. J.K. Nyerere: Freedom & Socialism, page 340.

'Ujamaa' in the traditional Swahili means "family-hood", but in its new rural sense it means socialist, communal or co-operative village organisation of "between 250 and 600 families, where they can be provided with the basic necessities for development - running water, education, medical care and easy access to markets. The next stage is to turn these villages into socialist communities in which the families work together on common land, run common marketing organisations, shops and workshops, and share the profits."⁴⁸

In the words of Nyerere - "Ujamaa" villages are intended to be socialist organisations created by the people, and governed by those who live and work in them. An "Ujamaa" village is a voluntary association of people who decide of their own free will to live together and work together for their common good."⁴⁹ The acceptance of the concept of "Ujamaa" and Ujamaa's emphasis on human equality also means that Tanzania is eager to build a classless society.

We aim at building a classless society for one reason. In no state is there enough wealth to satisfy the desire of a single individual for power and prestige. Consequently, the moment wealth is divorced from its purpose, which is the banishment of poverty, there develops a ruthless competition between the individuals; each person tries to get more wealth. Simply so that he will have more

48. The Economist, 12 April, 1975, page 60.

49. J.K. Nyerere: Freedom & Development, pages 36-37.

power, and more prestige than his fellows.
Wealth becomes an instrument of domination, a means of humiliating other people. 50

In his first inaugural address as President, Nyerere declared that:

We are determined to build a country in which all her citizens are equal; where there is no division into rulers and ruled, rich and poor, educated and illiterate, those in distress and those in idle comfort. We determined that in this country all would be equal in dignity; all would have an equal right to respect, to the opportunity of acquiring a good education and the necessities of life; and all her citizens should have an equal opportunity of serving their country to the limit of their ability. 51

This social objective was very near to the heart of Nyerere. Since independence the economic policies have been shaped and pursued in order to achieve this goal.

The Arusha Declaration of 1967 is unmistakably a significant step towards socialism. It declares:

The Arusha Declaration lays down a policy of revolution by evolution; we shall become a socialist, self-reliant society through our growth. We cannot afford the destruction

50. J.K. Nyerere: Freedom & Unity, page 207.

51. J.K. Nyerere: ibid., page 178.

of the economic instruments we now have nor a reduction in our present output ... Our change will, therefore, be effected almost entirely by the emphasis of our new development and by the gradual conversion of existing institutions into others more in accordance with our philosophy. 52

Nyerere admits that the solutions to these problems are slow, depending on the growth of socialist understanding and socialist attitudes among the people.⁵³ This is why Tanzania is not yet a socialist society.⁵⁴

However, the Arusha Declaration has started with an affirmation of the TANU creed of building a democratic socialist state, and outline the party's policies of socialism and self-reliance. It declares:

A true socialist state is one in which all people are workers and in which neither capitalism nor feudalism exist ... The way to build and maintain socialism is to ensure that the major means of production are under the control and ownership of the peasants and workers themselves through their Government and their co-operatives ... There cannot be true socialism without democracy. We now intend to bring about a revolution which will ensure that we ^{are} never again victims ... 55

52. J.K. Nyerere: Ujamaa: Essays on Socialism, page 1.

53. J.K. Nyerere: Freedom & Socialism, page 25.

54. J.K. Nyerere: "From Uhuru to Ujamaa", Africa Today, 1974, page 6.

55. Quoted in East Africa Law Review (1971), page 231.

President Nyerere said:

It was a declaration of intent to live a certain kind of life and to act in a certain kind of manner for desired ends. The ideology of the country was made explicit by it; also the introduction of 'leadership' qualifications, and the measures for public ownership, began a new series of deliberately socialist policy initiatives.⁵⁶

Regarding the 'leadership code', the Arusha Declaration points out that :

Socialism is a way of life and a socialist society cannot simply come into existence. A socialist society can only be built by those who believe in and who themselves practise the principles of socialism ... The successful implementation of socialist objectives depends very much upon the leaders, because socialism is a belief in a particular system of living, and it is difficult for leaders to promote its growth if they do not themselves accept it.⁵⁷

So to call themselves socialists, the leaders must strictly follow the principles laid down in the Declaration.

The present indication is that the leaders under charismatic and

56. J.K. Nyerere: Arusha Declaration, Freedom & Socialism, page 230.

57. Quoted from East African Law Journal, 1968, page 185.

dynamic leadership of President Nyerere are making every effort to transform the present society into a socialist one.

It has been admitted by Nyerere himself that it has a long way to go before all its people can enjoy the benefits of a socialist society. He said:

We shall not create socialist societies overnight because we have to start from where we are, we shall have to make compromises with capitalist money and skill, and we shall have to take risks in our development. But I am convinced that Third World countries have the power to transform themselves over time, into socialist societies in which their peoples can live in harmony and co-operation as they work together for their common benefits. ⁵⁸

In a remarkably frank assessment of a 10-year effort to build socialism in Tanzania, Nyerere has concluded that his country is certainly neither socialist nor self-reliant, and that the goal of making it so is not even in sight.

"Ten years after the Arusha Declaration ", writes Nyerere, in a document called "The Arusha Declaration 10 years after",

Tanzania is certainly neither socialist nor self-reliant. The nature of exploitation has changed but it has not been altogether eliminated. There are still inequalities

58. J.K. Nyerere: Freedom & Development, page 125.

between citizens. Our democracy is imperfect. A life of poverty is still the experience of the majority of our citizens. ⁵⁹

Furthermore, he says:

Our Nation is still economically dependent upon the vagaries of the wealthy and upon economic and political decisions taken by other peoples without our participation or consent. ⁶⁰

Nyerere is not very much disappointed by his failures, but he says that the fact that :

Tanzania was not yet socialist was neither surprising nor alarming. No country in the world is yet fully socialist, although many committed themselves to this philosophy decades before Tanzania even became independent. ⁶¹

He continues that:

We have changed the direction of our national development so that our national resources are now being deliberately directed toward the needs of this nation and its people. ⁶²

59. The Guardian, 21 April, 1977.

60. Ibid.

61. Ibid.

62. Ibid.

He warns his people of very difficult economic problems ahead for three and four years and appeals to them to make ^asustained effort to augment production and to take seriously the need for national self-reliance. He says: "There is a time for planting and a time for harvesting. I am afraid for us it is still time for planting." ⁶³

This statement can be seen as the most frank self-criticism by Nyerere of his own government's performance in the various fields. Although Tanzania has not been able to achieve its goals, if it does, Tanzania could well become a model for development in the Third World.

It is against this social, political and economic background ^{that} we _^ must consider the role and the usefulness of the public enterprise in the management of the economy.

CHAPTER 2

THE ROLE OF PUBLIC ENTERPRISE IN ECONOMIC DEVELOPMENT

- 2.1 The Decline of "Laissez-Faire" and the Rise of State Enterprise
- 2.2 Functions of a Modern State
- 2.3 Reasons for State Participation
- 2.4 The Indian Experience
- 2.5 The Historical Background
- 2.6 The Government's Attitude towards State Enterprise since Independence
- 2.7 Legal Forms of State Enterprise
- 2.8 Departmental Management

2.1. The Decline of "Laissez-Faire" and the Rise of State Enterprise

A century ago many economists believed in a policy of "laissez-faire" which means that government interference in industry and commerce should be avoided except insofar as it was necessary to break up private monopoly. This doctrine of non-intervention of government in economic affairs was wholeheartedly supported by the classical economists,¹ who took up the theme from Adam Smith:

The statesman, who should attempt to direct private people in what manner they ought to employ their capitals, would only load himself with a most unnecessary attention, but assume an authority which could safely be trusted, not only to no single person, but also to no council or senate whatever, and which would nowhere be so dangerous as in the hands of a man who had folly and presumption enough to fancy himself fit to exercise it. 2

They believed that the function of the government was to maintain law and order and defend the country from external invasion, and the business of the industry was to produce goods as cheaply as possible. Therefore, interference

1. The classical period of economics ranges from Adam Smith's Wealth of Nations, which was published in 1776, to J.S. Mill's Principles of Political Economy of 1848.

2. Adam Smith: Wealth of Nations, Book IV, Chapter 2.

by industry in politics was fatal to good government, and interference by the state in industry was fatal to efficient production. The wisest course for a government to follow was to pursue a policy of "laissez-faire"; to abstain from a blundering intervention and leave industry to its own devices.³

Although there was a great liberalising of economic activity, especially internationally, as a result of the acceptance of the doctrine of "laissez-faire", it has been shown that the state continued to intervene in order to protect the individual, encourage some collective action and even provide services itself,⁴ and by 1914 the "laissez-faire" philosophy was no longer considered efficient in theory nor necessary in practice.⁵

The twentieth century, especially from 1914 to 1945, has been a continuous period of war or preparation for war. A modern war affects all principal nations and means seizure of everything by the State. All productive activity is mobilised for a single purpose of defence. Every industry gives up production for peacetime and concentrates on war materials. Agriculture loses its manpower and foreign trade is confined to essential commodities. In this situation, the State undertakes the tasks that are usually left in the

3. A. Cairncross: Introduction to Economics, op.cit., page 595.

4. A. Skuse: Government Intervention and Industrial Policy, page 10.

5. Ibid., page 17.

hands of the private individuals. In other words, the economic system that was formerly free becomes entirely the business of the State. The essential function of the States becomes production and distribution. In every country the number of politicians and of economists who favour an extension of the economic function of the State has been continually growing, and especially after two World Wars such men were in the majority.

In 1919, Professor A.C. Pigou of Cambridge in his "Economics of Welfare", put forward his entirely logical arguments in favour of State intervention in industries of a monopolistic character. He discussed at great length the inherent disadvantages of traditional political institutions (i.e. municipal and national representative assemblies) as instruments for the control or the operation of monopolistic business enterprises, and indicated that these bodies were primarily created for the purposes other than that of intervention in industry. Pigou also pointed out that governmental areas being determined by non-commercial considerations, were often likely to prove unfit for intervention with the working of an industry. He finally concluded that modern developments in the structure and methods of governmental agencies have fitted these agencies for a degree of beneficial intervention with industry which would not have been justified in earlier times.⁶

6. A.C. Pigou: Economics of Welfare, page 299.

In 1926, J.M. Keynes supported the need of government interference in those services which were technically social, particularly for the control of savings and investment, the business cycle, and the development of a national population policy.⁷ He went on to say that:

I suggest, therefore, that progress lies in the growth and the recognition of semi-autonomous bodies within the State - bodies whose criterion of action within their own field is solely public good as they understand it, and from whose deliberations motives of private advantage are excluded, though some place it may still be necessary to leave, until the ambit of men's altruism grows wider, to the separate advantages of particular groups, classes or faculties - bodies which in the ordinary course of affairs are mainly autonomous within their prescribed limitations, but are subject in the last resort to the sovereignty of the democracy through parliament. ⁸

Keynes concluded his essay with the remarks:

The full advantage of the natural tendencies of the day must be made; semi-autonomous corporations must be preferred to organs of the central government for which Ministers of State were directly responsible. ⁹

7. J.M. Keynes: The End of Laissez-Faire, page 46.

8. J.M. Keynes, *ibid.*, page 47.

9. *ibid.*, *op.cit.*, page 45.

Professor J.K. Galbraith of Harvard University is of the opinion
that :

certain of the retarded industries are of peculiar importance not alone for comfort, well-being, tranquility and happiness but also for continued existence. They provide shelter, health services and local transportation of people. Housing, particularly in a cold climate, medical attention and the means of reaching one's place of employment are not frivolous needs. He maintains that these industries cannot function in the market system. The only answer for these industries is full organisation under public ownership. He also points out that with the rise of the market and the planning systems, and the consequent inequality in development, the case for public ownership becomes much more general. 10

There is considerable substance in the argument that, left to itself, the private sector is unlikely to invest in the development of public utilities as the government would. Naturally, development of these utilities has to be initiated by the government.

Even a country like the United States of America, which has preached and practised the philosophy of private enterprise, coupled with a deep distrust of State intervention in the economy, has finally buried the

10. J.K. Galbraith: Economics and the Public Purpose, pages 279-81.

doctrine of "laissez-faire" by the massive body of social legislation passed after the Great Depression of the 1930's in the era of the 'New Deal'. Federal and State social legislation, providing for unemployment insurance, social security and many other aspects of minimum welfare, was supplemented by the acknowledgement of an active role of the State in guiding and regulating the state of employment and business in the nation.¹¹

Almost every State today, both developed and undeveloped, has emerged as an active participant, taking upon itself the role of protector, of controller, of guardian of the citizen, and of entrepreneur. In fact, there is hardly any sphere of human activity today which is not, in some way or the other, controlled and regulated by the all-powerful, all-embracing machine which is the modern State.¹²

11. W. Friedmann: The State & the Rule of Law in a Mixed Economy, page 13.

12. S.S. Khera: Government in Business, page 3.

2.2. Functions of a Modern State

Professor W. Friedmann, a renowned, International jurist, has recognised the following positive functions of a modern State:

- (i) **State as Provider.** In this role, the State makes itself responsible for the provision of social services so as to ensure a minimum standard of living for all, in mitigation of the free play of economic forces.
- (ii) **State as Regulator:** In this capacity, the State uses various leverages of control, notably the power to regulate investment in industrial development, the volume and kind of imports and exports through such means as exchange control and import and industrial licensing controls.
- (iii) **State as Entrepreneur.** In this role, the State operates certain sectors of the economy, either through semi-autonomous government departments, or through State-owned corporations.
- (iv) **State as Umpire.** The State must have standards and institutions which ensure minimum fairness, and the maintenance of a reasonable balance between the different economic and social groups in the community.¹³

13. W. Friedmann: The State and the Rule of Law in a Mixed Economy, page 3.

All the countries today with a rare exception, are actively involved in industrial and commercial management due to their political, economic and social commitments, i.e. commitment to socialism and to build a social welfare society. Hence, State enterprise is a world-wide phenomenon.¹⁴ But the degree of government participation in the economic affairs differs from one country to another: in Communist countries such as the U.S.S.R., the government owns and controls almost all productive resources; in other countries, such as Peru, State enterprise is relatively rare. Countries such as the United Kingdom, India, France and Tanzania are often described as "mixed economies", which means that both public and private enterprises coexist. In fact, they will not be rivals but will be complementary forces.

14. W. Friedmann: The State and the Rule of Law in a Mixed Economy, page 52.

2.3 Reasons for State Participation

The following principal reasons could be put forward in order to justify the State participation in industrial and economic affairs :

(i) The State participation may be essential where ^{there are} certain vital things which the individual can never do , either because he has not the necessary strength to perform them, or because they would not pay him adequate returns; or again, because they require the co-operation of everybody, which can never be obtained merely by common consent. The State is the person - the entrepreneur - who can undertake such tasks.

(ii) State enterprise is the principal instrument by which countries that suffer from a deficiency of private venture capital can undertake vital national development tasks - usually within the framework of a long-term development plan; ¹⁵

(iii) There are certain functions regarded as vital for the nation, which cannot or will not be assured by private enterprise; ¹⁶

(iv) Some industries by their very nature, must be monopolies, such as supplies of gas, water, electricity, etc., and since a private firm running

15. W. Friedmann: The State and the Rule of Law in a Mixed Economy, page 53.

16. Ibid., page 53.

such a monopoly might charge exorbitant prices, it is sometimes felt that these services are better provided by the State;

(v) A government may decide to take over or set up an industry which it feels has some strategic and national importance for the country;

(vi) State enterprise is sometimes recommended on the grounds that if the government owns and controls several of the major industries in a country, it can use this as a lever, if need be, to manipulate the economy as a whole;

(vii) Nationalisation is sometimes suggested as a means of reducing inequality of wealth in a community;

(viii) The other main inspiration is social and political philosophy.¹⁷

A government is sometimes under obligation to enter directly into industrial and economic activity in order to achieve its declared ideological objectives.

17. W. Friedmann: Government Enterprise - A Comparative Analysis, page 305.

2.4 The Indian Experience

The politico-economic justice and social welfare are placed at the top of the priority list of a democratic country. Every democracy, since the War, has witnessed an unprecedented and remarkable growth in the 'public sector'. And India is no exception. Public sector is a broad term used to describe a variety of State activities. The definition of the French economist, Maurice Bye, is appropriate. The public sector of the economy, he says,

may be most easily defined by a process of elimination. It excludes enterprises that are entirely operated by private individuals or groups. It also excludes economic enterprises that are owned by governmental units inferior to the national government, like the departments and cities (i.e. local authorities), and public services performed by agencies of the national government whose purposes are not mainly economic, like defense, education, and the administration of justice. 18.

18. M. Bye, E. Etmandt & E. Rossi: Nationalisation in France and Italy, page 65.

2.5 The Historical Background

Planning was advocated in India much before independence by individuals, groups, the Congress Party as well as the government. The leaders of the National Congress Party felt that if all-round progress was to be achieved, the development of industry must be planned by government. In August, 1937, the Indian National Congress established the National Planning Committee, under the Chairmanship of Jawaharlal Nehru. The work of the National Planning Committee continued under the guidance of Jawaharlal Nehru. Only in 1949 this Committee produced and presented its main report, as well as a number of subsidiary reports on specific sectors of the economy.

In fact, the first attempt at planning began in 1934. In this year, Sir M. Visvesvaraya in his pioneering work, Planned Economy for India, advocated the necessity for planning and also laid down a ten-year programme of planned economic development for the whole of India. But no definite action was taken by the then government.

In 1944, a few industrialists and economists in Bombay brought out a plan for the economic development of India which was popularly known as the 'Bombay Plan'. At about the same time, the Indian Federation of labour put forward another plan, prepared by the late M.N. Roy, called the 'Peoples Plan',

It was a ten-year plan and put special emphasis on agricultural development, mainly through nationalisation of land, and on the setting up of large-scale industries to be owned by the State.

After World War II, a new and separate Department of Planning and Development was set up by the Government of India. A new industrial policy was announced and the then Viceroy, Lord Wavell, declared in 1945: "Government has decided to take positive steps to encourage and promote industrialisation of the country to the fullest extent possible." ¹⁹

19. Quoted from S.S. Khara's, Government in Business, page 8.

2.6 Government's Attitude to State Enterprise since Independence

However, it was after Independence that the Government of India set up the Planning Commission in March 1950, to prepare a plan for the most effective and balanced utilisation of the country's resources. The Commission is an advisory body. Legally, it has neither constitutional nor even statutory authority. The plans drawn up by the Commission are submitted to the National Development Council and the Cabinet, and when accepted, are placed before Parliament itself. It is only after they are approved by Parliament, that they receive the necessary sanction.

In support of planning, Jawaharlal Nehru wrote:

Planning is essential for steady progress because otherwise we waste our resources which are very limited. Planning does not mean a mere collection of projects, or schemes, but a thought-out approach of how to strengthen the base and pace of progress, so that the community advances on all fronts.²⁰

The concept of planned economy has given a significant role to State enterprises. Professor A.H. Hanson rightly remarked: "Public enterprise without a plan can achieve something; a plan without public enterprise

20. Jawaharlal Nehru: The Basic Approach, Economic Review, 15 August, 1958.

is likely to remain on paper." ²¹ Gandhiji's view on State ownership of basic industries can be gathered from the following quotation. In 1946, he stated: "I do not believe in armchair or armed socialism. I would have State ownership where a large number of people have to work together, the ownership of the products of their labour, whether skilled or unskilled, will rest in them through the State." ²²

Since Independence, India has been governed by a philosophy of mixed economy and social welfare. ²³ In a mixed economy, the State usually assumes the role of entrepreneur and is directly and actively engaged in the economic and industrial management.

In April 1948, the Government of India came out with their Statement on industrial policy. The Government had enunciated in this document, the respective roles of State and private enterprise. It reads:

A dynamic national policy must, therefore, be directed to a continuous increase in production by all possible means side by side with measures to secure its equitable distribution. In

21. A.H. Hanson,; Public Enterprise and Economic Development, op.cit., page 183.

22. M.K. Gandhi: Cent Percent Swadeshi, Hartjan Weekly, 1 September,

23. A. Ganguly: Public Corporation in a National Economy, page 65.

the present state of the nation's economy, when the mass of the people are below the subsistence level, the emphasis should be on the expansion of production, both agricultural and industrial, and in particular, on the production of capital equipment, of goods satisfying the basic needs of the people, and of commodities the export of which will increase earnings of foreign exchange. The problem of State participation in industry and the conditions in which private enterprise should be allowed to operate must be judged in this context. 24

Accordingly, the industrial field was classified into three categories:

- a) Strategic industries which should be the exclusive monopoly of the State;
- b) Key industries, where existing private concerns would be allowed to operate for the next ten years, *except but* "the inherent right of the State to acquire any existing industrial undertaking will always remain, and will be exercised whenever public interest requires it."
- c) The remaining industries, where private enterprise would be allowed to operate, subject to such government control and regulation as were considered necessary.

The political leaders did not rely on this policy document alone.

With a view to achieving the objectives, the framers of the Constitution in

clear and unequivocal language, inserted a specific provision in the Chapter of Directive Principles of State Policy which reads:

The State shall so direct its policy, that (a) the ownership and control of material resources of the community are distributed to subserve the common good, and (b) the operation of the economic system shall not result in the concentration of wealth and means of production to the common detriment. 25

This provision naturally gave impetus to public enterprise.

In April 1956, a new Industrial Policy Resolution was announced by the Government of India, in which the place of State enterprise was firmly secured. The Resolution declared:

The adoption of the Socialist pattern of society as the national objective, as well as the need for planned and rapid development, require that all industries of basic and strategic importance, or in the nature of public utility services, should be in the public sector. Other industries which are essential and require investment on a scale which only the State, in present circumstances, could provide, have also to be in the public sector. 26

25. Article 39 of the Indian Constitution.

26. Government of India, Resolution on Industrial Policy, dated 30 April, 1956, 2.

In order to realise the objective of the Socialist pattern of society, the Resolution stated:

These would provide the economic foundations for increasing opportunities for gainful employment and improving living standards and working conditions for the mass of the people. Equally, it is urgent to reduce disparities in income and wealth which exist today, to prevent private monopolies and the concentration of economic power in different fields in the hands of small numbers of individuals. Accordingly, the State will progressively assume a predominant and direct responsibility for setting up new industrial undertakings and for developing transport facilities.

After considering all aspects of the problem, and in consultation with the Planning Commission, the Government of India divided industries afresh into three groups having regard to the part the State would play in each of them. In the first category will be the industries such as Arms and Ammunition, Atomic energy, Coal, Transport, Iron and Steel, etc., the future development of which will be the exclusive responsibility of the State. The second category will consist of industries such as Machine tools, Fertilizers, Chemical pulp, Road Transport, Sea Transport, etc., which will be progressively State-owned and in which the State will therefore, generally take the initiative in establishing new undertakings, but in which private

enterprise will also be expected to supplement the effort of the State. The third category will include all the remaining industries, and their future development will, in general, be left to the initiative and enterprise of the private sector.

The acceptance of the concept of a welfare society, the important ingredients of which are incorporated into the text of the Constitution, gave another fillip to State enterprises. The Constitution requires the Government to secure:

- a) The right of all Citizens to adequate means of livelihood;
- b) The right to work;
- c) The right to education;
- d) The right to receive assistance from the Government in the event of unemployment, old age, sickness, and accidents; and establish
- e) human conditions of work and decent standard of living for all the workers.²⁷

State enterprise is, therefore, recognised as a useful instrument of the modern welfare state for achieving its welfare and development functions. The concept of State enterprise obtained substantial support from Professor J.K. Galbraith. He said that: "great social and economic tasks would, in the absence of public action, remain unperformed and these

27. Articles 41, 42 and 43 of the Indian Constitution.

are of a magnitude or involve a risk or require and exercise and imagination which is beyond the scope of the private sector." 28

Professor W. Friedmann indicated that the success of State enterprise in a mixed economy would depend upon a congenial political climate. He said that:

as the Welfare State assumes more and more economic functions the area of controversy widens as to the proper adjustment of the spheres of public and private enterprise. The mixed system of public and private enterprise in a democratic State can operate satisfactorily only if the major parties are agreed on fundamentals, and if matters of economic management are, to a large extent, kept out of the spheres of political controversy. 29

The concept of State enterprise has won recognition from both Socialist as well as Conservative thinkers. For those on the political 'right', see State enterprises as guarantees that activities are carried on in accordance with sound "business and commercial principles, as the nearest approximation to the private sector that the Government can create, while those on the 'left' see the State enterprise as a public body operating in the

28. From a report of Ajit Bhagat Memorial Lecture Series on "Socialism in rich countries and poor", The Hindu, 10 February, 1975.

29. W. Friedmann: Legal Theory, op.cit., pages 342-345.

public interest and not merely for private profit.

In a mixed economy, the size and permanency of the State enterprises depend on the basic policies of the Government and its political system. But one conclusion that holds good for all undeveloped countries is that State enterprises have an essential role to play in the development process,³⁰ and they are here to stay.

30. A.H. Hanson: Public Enterprise and Economic Development, op.cit., 203.

2.7 Legal Forms of State Enterprise

The forms of State enterprise have at the present time attained a considerable diversity and any classification must necessarily be somewhat artificial. The activities of the State are carried out in three principal legal forms:

- (1) By departmental government enterprises, which have varying degrees of administrative and financial autonomy.
- (2) By statutory corporations which are entrusted with a particular function and created by statute.
- (3) By commercial companies which are controlled by State ownership of shares, either directly or through a State-holding company.

If State enterprises are to work efficiently, a right and appropriate type of management should be chosen. Let us examine the relative merits of each of the above types.

2.8 Departmental Management

The first State enterprises are often organised as Government Departments. Many countries have used the Departmental management system for Railways, Ports, Harbours, Commercial and Industrial monopolies of a revenue-raising character and even for manufacturing industries. In India, Railways, the biggest State enterprise is run departmentally and now Chittaranjan Locomotive Works and the Integral Coach Factory and certain factories for the making of munitions and the supply of special defence needs are organised, financed and controlled in much the same way as any other Central Government department.

In its 'pure' form, it has the following attributes:

- (1) The enterprise is financed by annual appropriations from the Treasury and all, or a major share of its revenues, are paid into the Treasury;
- (2) The enterprise is subject to the budget, accounting and audit controls applicable to other Government departments;
- (3) The permanent staff of the enterprise consists of Civil Servants, and the methods by which they are recruited, and conditions of service under which they are employed, are ordinarily the same as for other Civil Servants;

- (4) The enterprise is generally recognised as a major sub-division of one of the Central departments of the Government and is subject to the direct control of the head of the department;
- (5) Wherever this applies, in the legal system of the country concerned, the enterprise possesses the sovereign immunity of the State and cannot be sued without the consent of the Government. 31

With regard to point (5), India's position is somewhat different.

Under the provision of the Constitution, the Union of India is a legal person.³²

At present, the liability of the Union of India to be sued is determined by

Article 300, which reads:

The Government of India may sue or be sued by the name of the Union of India and the Government of the State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.

31. Report of the Seminar on Organisation and Administration of Public Enterprises in the Industrial Field, Rangoon, United Nations, 1954, page 6.

32. Union of India v. Satyendra Nath, AIR 1955 , Cal.581.

The position continued to be the same under the Government of India Act, 1915 (S.32) and Government of India Act, 1935 (S.176):

1915 - Section 32:

Every person shall have the same remedies against the Secretary of State-in-Council as he might have against the East India Company if the Government of India Act, 1858 and this Act had not been passed.

1935 - Section 176:

The Federation may sue or be sued by the name of the Federation and without prejudice to the subsequent provisions of the Chapter may, subject to any provisions which may be made by Act of the Federal or a Provincial Legislature enacted by virtue of powers conferred on that Legislature by this Act, sue and be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed.

These old Statutes have now been repealed.

What then is the liability of the Union or the States of India today?

Under the ordinary law of Contract, the liability of the State is the same as that of an individual. This position is regulated by Article 299(2) of the Constitution which states that neither the President nor the Governor nor any person executing a contract shall be liable. It is the Central Government of India or the Government of a State^{which} may be sued for breach of any contract. The liability of the Government has been discussed in

the following Chapter.

For maximum accountability this form of operation is considered the most suitable, but nowadays it is less in favour because of the demand for more 'businesslike' enterprises. The department is under strict Ministerial control and the Minister is answerable to the Cabinet and to Parliament for its activities. The administration of the enterprise is in the hands of Senior Civil Servants and financial control rests with the Treasury. A clear relationship with other parts of the Government structure is another advantage of this type of management.

In view of the above advantages, this type of management is not popular as it suffers from very many disadvantages.

The Rangoon Seminar pointed out that :

Departmental management often breeds a tendency not to take losses seriously. This has been particularly noticed in the Asian region. Even in cases of continuous losses, no serious attempt is made to re-organise or retrench or liquidate. At the same time, the consumer who may, in most cases, be the same person who is the tax-payer, may suffer by having to pay high prices or by being subjected to inefficient service. 33

The Seminar went on to add that:

It fails adequately to take into account certain distinguishing characteristics which clearly set most enterprises apart from the general run of government programmes, viz., (i) The government is dealing with the public in the manner of a businessman rather than a sovereign; (ii) Individual users, rather than the general tax-payer, are to pay for the cost of the goods and services; (iii) expenditures necessarily fluctuate with consumer demand and cannot be predicted accurately or realistically kept within annual budgetary limitations; and (iv) Operations are being conducted within areas in which there are well-established trade practices. Under this form of organisation public enterprises have sometimes become synonymous with red-tape, delays, inadequate service and insensitivity to consumer needs. 34

The other main weaknesses of the Departmental Management are the following:

- (i) The management cannot function autonomously. There cannot be enough flexibility in the Capital structure; private capital cannot be invited if needs arise.
- (ii) The method of accounting that is applied in the Departmental Management is not suitable to economic enterprise as it does

not present a clear picture of the operating position or results of working.

- (iii) This type of management does not work on business principles and is not flexible. It cannot be free from political interference.
- (iv) It has all defects of Government departments, such as delay, rigidity, lack of business experience and knowledge on the part of Government servants.

Despite its many defects as mentioned above, this form of management is not without supporters. A distinguished author like Professor M.E. Dimock remarked,

If sufficient improvements could be made among the departments in the direction of greater autonomy and flexibility, there would be little or not justification for public corporations at all. 35

Another author, Mr. J. Prasad, came to the conclusion that "the form of public enterprise is immaterial and that what matters is the spirit in which a public enterprise is run." 36

35. M.E. Dimock: "Government Corporations, a Focus of Policy and Administration", American Political Science Review, Vol. XLIII, page 1163.

36. J. Prasad: Nationalisation of Road Transport in U.P., Indian Journal of Public Administration, Oct. - Dec., 1956, page 336.

To overcome some defects, though the Indian Railways are departmentally managed, many powers have been delegated to the Railways Administration. A Board has been established for prompt decision and it functions as a Ministry of the Government of India. The Railway Board has a Chairman, three members and a financial commissioner, all of whom technically have the status of a Secretary to the Government of India.³⁷ The Constitution of the Railway Board allows the Board full freedom in shaping and carrying out the Railway policy and exercises all powers in respect of regulation, construction, maintenance and operation of Railways. It has its own financial, administrative, accounting and auditing departments as well.³⁸

The problem often arises if and when an attempt is made to give some freedom of flexibility and autonomy to a particular departmental management because "strong pressures are brought to make it conform to standard regulations and procedures. Since emphasis on uniformity is a common characteristic of bureaucratic administration."³⁹

Professor A.H. Hanson has expressed his doubt about the departmental

37. S.S. Khara: Government In Business, page 58.

38. Ibid.

39. Report of the Seminar on ... Public Enterprise, United Nations, op.cit., page 8.

organisation as a successful public enterprise.

He observed:

Even in a developed country, with an intelligent and adaptable Civil Service, the operation of making a genuine public enterprise out of a government department is not one to be lightly undertaken; in an under-developed country it is often impossible. Special forms of organisation, therefore, are normally necessary. 40

But Mr. A.D. Gorwala did not reject the concept of departmental management altogether: he admitted its restricted role and rightly pointed out:

Departmental management must be the rare exception, not the general rule. In many ways it is the direct negation of the requirements of autonomy. It militates against initiative, flexibility ... for departmental management means management by one or more Administrative Departments as part of their larger routine, inevitably in conjunction with the Finance Department as part of its own routine, with an attempt in some instances to minimise the routine aspects of the disposal by entrustment to a committee formed of departmental representatives, but in every case against the background of the rules, regulations, and procedure inseparable from ordinary administration and of the plenary control of Minister and Parliament, also inseparable from that administration ... Nevertheless, in a few types, departmental management is inevitable.

40. A.H. Hanson: Public Enterprise and Economic Development, op.cit., page 342.

These must be defined, isolated and kept down to the minimum. 41

The main characteristics of the departmental management may be briefly recapitulated. At its head is a Minister who takes full responsibility for all acts of officials under him. Ultimate control is political; the Minister is a member of the Government and at each general election the electorate has an opportunity to pass a verdict on how the government has discharged its responsibilities. Between elections, control is exercised through its representatives in Parliament - at question time, in debate, and by the investigations of the Estimates and Public Accounts Committees, the non-political control is exercised by the Treasury, which keeps a close check on both the financial and staff of each department. Thus both the policy and day-to-day operations of a department are subject to scrutiny.

41. A.D. Gorwala: Report on the Efficient Conduct of State Enterprise, pages 13-14.

CHAPTER 3

PUBLIC CORPORATION AS AN INSTRUMENT OF STATE POLICY

- 3.1 Introductory
- 3.2 Legal Definition of Characteristics
- 3.3 Historical Development in Britain
- 3.4 Historical Development in India
- 3.5 Classification of Public Corporations
- 3.6 Characteristics of Indian Public Corporations
- 3.7 Organisation and Management
 - (i) Central Management Board
 - (ii) Term of Office
 - (iii) The Size of the Board
 - (iv) Disqualification for Membership
 - (v) Advisory Council

3.1 Introductory

In addition to the Government Departments under the direct control of Ministers, the delegation of responsibilities by the Government to semi-autonomous bodies has become an increasingly important feature of the central administrative system as Government has extended its participation in social and economic activity. These bodies have been variously described by writers as 'Public Corporations', 'National Corporations', 'Statutory Corporations', 'Parastatals', 'Quasi-Government Bodies', 'Semi-autonomous authority' and 'Public Boards'. Out of these expressions, the term 'Public Corporation' has, for one reason or another, emerged as the most fashionable in contemporary use though the term is used with a variety of meanings and content.¹

In 1933, Mr. Herbert Morrison, the Chief Architect of modern public corporations, wrote that "We are seeking a combination of public ownership, public accountability and business management for public ends."² He went on to say:

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1. D.N. Chester: Public Corporations and the Classification of Administrative Bodies in Political Studies, Vol. I, page 34.
 2. H. Morrison: Socialization & Transport (1933), page 149.

It is important that, from the beginning, the public corporation should be regarded by all, and should regard itself, as a public concern. Its first business is the competent conduct of the undertaking committed to its charge in the public interest. It must feel that it is responsible to the nation accordingly, and that it cannot be the instrument of this or³ that private or sectional interest.

3.2 Legal Definition and Characteristics of Public Corporations in General

It is difficult to work out a precise definition that will reflect all the characteristics of the different types of public Corporations. According to Professor W. Friedmann, "all public Corporations have a dual nature; they are instruments of national policy, but they are autonomous units with legal independence and certain aspects of commercial undertakings".⁴ They are "clothed with the power of government but possessed of the flexibility and initiative of private enterprise".⁵ Thus, the public Corporations are created with the objective of securing the best of both worlds: on the one hand, the world of energetic dynamic endeavour found in the private enterprise system; on the other, the world of accountability to the public, to whom they belong and whom they serve.

Professor H. Wade's statement seems to suggest a definition when he says: "The Public Corporation is a hybrid organism, showing some features of a government department and some of the features of a business company, and standing outside the ordinary framework of central and local government."⁶ Professor J.F. Garner has described public Corporation as "an

4. W. Friedmann: Law and Social Changes in Contemporary Britain, (1951), page 191.

5. These words are from President Roosevelt's address to the American Congress when he introduced the bill creating the Tennessee Valley Authority, D.E. Lilienthal, TVA, 1944, page 50.

6. H.W.R. Wade: Administrative Law (1977), page 30.

important third arm of government in addition to the traditional instruments of the central executive and local authorities" and has defined a public corporation as:

a legal entity established normally by Parliament and always under legal authority, usually in the form of a special statute, charged with the duty of carrying out specified Governmental functions in the national interest, those functions being confined to a comparatively restricted field, and subjected to some degree of control by the executive, while the corporation remains juristically an independent entity not directly responsible to Parliament. 7

In one respect this definition is open to criticism in that what functions are considered as "Governmental" depends on the traditions of the country or the political philosophy of the individual making the distinction.

Public Corporation is used here in the sense of an institution created by an Act of the Legislature and "operating a service on behalf of Government but as an independent legal entity with funds of its own and largely autonomous in its management." 8

The principal characteristics of a public Corporation have been summed up by Professor W. Friedmann in the following terms:

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7. J.F. Garner: "Public Corporations in the United Kingdom" in Government Enterprise, Ed., W. Friedmann, (1970) pages 4-5.
 8. W. Friedmann: The Public Corporation (1954), page 541.

First, each public Corporation is separately established by statute, or in rare cases by charter; it is an individual not a type. Second, the public Corporation is an independent Corporation with separate legal personality. Third, its administration is in the hands of an independent governing board appointed by the government, not by representative groups or interests. Fourth, the employees of the Corporation are not Civil Servants. Fifth, none of the public Corporations has shares or shareholders. Sixth, all public Corporations are responsible to the government, through the competent Minister and they are subject to his general direction. Through the government they are responsible to Parliament. Seventh, all public Corporations have in their day-to-day operations the character of other private legal persons. They are fully liable in law. Eighth, judicial control over the public Corporations as regards the use of powers is exercised in the same manner as over other public authorities. Ninth, the public Corporations have altogether a dual nature. In their commercial and managerial aspects they resemble commercial companies and they have essentially private law status. But insofar as they fulfil public tasks on behalf of the government and Parliament they are public authorities, and as such subject to control by the government, within the limits defined by statute and as developed by practice and defined by the Courts. 9

It will be seen later that with regard to points one and five above, the position of the Indian and Tanzanian Corporations is somewhat different.

The United Nations Seminar on the organisation and administration of public enterprises ¹⁰ has set out the following essential characteristics of a public Corporation:

- (1) It is wholly owned by the State.
- (2) It is generally created by or pursuant to a special law defining its powers, duties and immunities and prescribing the form of management and its relationship to established department and ministers.
- (3) As a body Corporate, It is a separate entity for legal purposes and can sue and be sued, enter into contracts and acquire property in its own name. Corporations conducting business in their own name have been generally given greater freedom in making contracts and acquiring and disposing of property than ordinary Government departments.
- (4) Except for appropriations to provide capital or to cover losses, a public Corporation is usually independently financed. It obtains its funds from borrowing, either from the treasury or from the public, and from charging for its services. It is authorised to use and re-use its revenues.
- (5) It is generally exempted from most regulatory and prohibiting statutes applicable to expenditure of public funds.

10. The Seminar was held in Rangoon from 26 March, 1954, under the auspices of the Economic Commission for Asia and the Far East and the U.N. Technical Assistance Administration and the International Institute of Administrative Sciences, page 9.

- (6) It is ordinarily not subject to the budget, accounting and audit laws and procedures applicable to non-corporate agencies.
- (7) In the majority of cases, employees of public Corporations are not Civil Servants, and are recruited and remunerated under terms and conditions which the Corporation itself determines.

This concept of a public Corporation has been hailed by Professor W.A. Robson as "the most important constitutional innovation which has been evolved in Great Britain during the past fifty years".¹¹ He rightly observed that:

the underlying reason for the creation of the modern type of public Corporation is the need for a high degree of freedom, boldness and enterprise in the management of undertakings of an industrial or commercial character and the desire to escape from the caution and circumspection which is considered typical of government departments. ¹²

But it is no doubt true that the degree of autonomy of management enjoyed by the public Corporation depends on the political system and the attitude of the executive. Professor W. Friedmann has, it is submitted, correctly pointed out that:

11. W.A. Robson: Nationalised Industry & Public Ownership (1962), page 77.

12. Ibid., page 47.

the most serious single problem that has emerged in the practical application of the theory of the public Corporation is the tension between autonomy of management and the tendency of the superior government authority, i.e. the responsible Minister, to interfere with the operation of the enterprise for political reasons. 13

This institution has been more distinctly developed and more successfully applied in Britain than elsewhere.¹⁴ Many considered that the 'bureaucratic uniformity' of the Civil Service and the 'irresponsibility' of the Joint Stock Companies were defects which the public Corporation was able to avoid. The British Public Corporation has served as a model for the numerous public enterprises constituted in other parts of the Commonwealth.¹⁵ Almost all public Corporations in India, with the exception of Damodar Valley Corporation which was modelled on the Tennessee Valley Authority, have closely resembled the British pattern. However, the Tanzanian Corporations do not follow the same pattern. But it should be mentioned here briefly that in certain vital respects the Indian statutes do differ from the British statutes. In the first place, the

13. W. Friedmann; The State and the Rule of Law in a Mixed Economy, page 58.

14. W. Friedmann: The Public Corporation, page 556.

15. W. Friedmann: The State and the Rule of Law in a Mixed Economy, page 57.

power of the central government to provide further capital is not restricted by any limitation other than what must be connected with the business of the Corporation itself.¹⁶ In the second place, the power of the central government to give directions to the Corporations is generally not restricted.¹⁷ And finally, the accounts of Indian Corporations unlike those of the British commercial corporations, are audited not by commercial auditors but by the Comptroller and Auditor General.¹⁸

As the majority of the Indian public Corporations have closely followed the British model, it will be helpful for our purpose to outline the historical development of this modern institution in the respective countries.

16. S.10(2), Air Corporations Act, 1953.

17. S.34(1), IAC Act, 1953, S.21, LIC Act, 1956, S.48, D.V.C. Act, 1948.

18. S.15(2), IAC Act, 1953, S.22(2), The Oil and Natural Gas Commission Act, 1959.

3.3 Historical Development in Britain

In Britain the public Corporation, as an institution performing certain governmental, specialist, technical or cultural functions, with varying degrees of freedom from executive control, has been familiar.¹⁹ Some of them date back to the early years of the 19th century. For example, the present development may be said to have started in 1834 when the Poor Law Commissioners were established.^{19a} However, Professor Robson has classified them into five different varieties.²⁰

Firstly, there are bodies entrusted with some regular governmental functions, e.g. the Public Trustee (Public Trustee Act, 1906). Secondly, there are organs performing technical and specialist functions such as the Medical Research Council (National Health Insurance Act, 1928, now under, National Health Service Act, 1946). Thirdly, there are bodies concerned with cultural activities such as the British Council (Royal Charter, 1940). Fourthly, there are bodies which are integral parts of certain departments but have an individual and separate status such as

19. W.A. Robson: Problems of Nationalised Industry, (1952), pages 15-17.

19a. Griffith and Street: Principles of Administrative Law, page 283.

20. For a detailed discussion, see W.A. Robson: Nationalised Industry & Public Ownership, pages 46-47.

the Commissioners for Crown Lands (Crown Lands Act, 1927, now under Land Commission Act, 1967). Fifthly, there are newer types of Corporations entrusted with the great socialized services and industries.

The new types of business or service corporations fall into two classes - those established before 1945 and those that were set up after that date chiefly by the Labour Government during 1945-51 in pursuance of its programme of nationalisation. Of the pre-1945 Corporations, the Port of London Authority, set up in 1908,²¹ is considered to be the first prototype of a modern Corporation. It is by statutory definition a body Corporate and was entrusted with the management of a local service of national importance and was, for that purpose, granted a high degree of autonomy. The Authority is under a Statutory obligation to present its annual reports to the Minister and the Minister is its spokesman. In 1926, the Central Electricity Board was set up under the Electricity Supply Act, 1926,²² consisting of a Chairman and seven members, appointed by the responsible Minister. Now, electricity is supplied by twelve Area Boards and the Central Electricity Generating Board, set up under the Electricity Acts, 1947 and 1957. The British Broadcasting Corporation was established under Royal Charter issued on 20 December, 1926. It is a national organisation of international

21. Port of London Act, 1908, S.1.

22. S.1.

importance and enjoys substantial autonomy in the management of its affairs. Its television service started in 1936. Independent television began in 1954 and is now under the Independent Broadcasting Authority established by the Television Acts of 1954 and 1964. In 1933, the London Passenger Transport Board²³ was created on the recommendations of Mr. Herbert Morrison, a leading and influential advocate of the public Corporation. The Railways were nationalised only in 1947 and are now administered by the British Railways Board established under the Transport Act, 1962. Since the Transport Act, 1968, there has been a National Freight Corporation to coordinate road and rail freight services and a National Bus Company operates nationalised bus services mainly in country areas. The very last Corporation that was set up before the Second World War was the British Overseas Airways Corporation (1939).²⁴

After World War II some entire industries and services were brought under public ownership and control. They included fuel (coal), power (gas and electricity), iron and steel, transport and communications, the Bank of England, health and education. The main political driving force behind the first kind of development has, of course, been the public ownership policies of successive Labour Governments.²⁵

23. London Passenger Transport Act, 1933, S.1.

24. British Overseas Airways Act, 1939, S.1.

25. For a detailed discussion, see E. Barry: Nationalisation in British Politics.

The Civil Aviation Act, 1946, re-affirmed the existence of the British Overseas Airways Corporation and established British European Airways, both of which were brought under the unified control of the British Airways Board in 1973 by the Civil Aviation Act, 1973. In 1946, the Bank of England was nationalised and brought under public ownership by the Bank of England Act, 1946. In the same year, coal mining was placed under the National Coal Board.²⁶ The Transport Act, 1947, brought under public ownership the canals and inland waterways, and also the chain of hotels and restaurants owned by the Railways. Gas was nationalised in 1948²⁷ when the industry was placed under a Central Gas Council (now the British Gas Corporation) and twelve Area Boards. In 1949, the iron and steel industry was brought under public ownership;²⁸ it was denationalised by the Conservative Party in 1953, but re-nationalised by the Labour Government under the present British Steel Corporation Act, passed in 1967. The Atomic Energy Authority, became a public Corporation under the Atomic Energy Authority Act, 1954. In 1969 the management of the Post Office was reorganised under the Post Office Board.²⁹

26. Coal Industry Nationalization Act, 1946.

27. The Gas Act, 1948.

28. The Iron & Steel Act, 1949.

29. The Post Office Act, 1969.

3.4 Historical Development in India

Public corporations in India can claim a respectable antiquity. The public corporation in its modern form originated in the Bombay Port Trust created in 1879 for the administration of the affairs of the Port of Bombay.³⁰ It was provided in the Bombay Port Trust Act, 1879 that the Board shall be a body corporate and have perpetual succession and shall sue and be sued in its own name.³¹ Section 26 has empowered the Board to acquire and hold movable and immovable property in the name of the Board. The Board was under an obligation to present a half-yearly statement of accounts duly audited by such auditors as shall, from time to time, be appointed by the Government. The Board was also entrusted with substantial financial and legal autonomy. The remarkable success of the Port of Bombay trust had influenced the Government to establish similar authorities in Calcutta and Madras in 1890 and 1905, under the Port of Calcutta Trust Act, 1890, and the Port of Madras Trust Act, 1905, respectively.

After the First World War some public corporations with specialised functions were established. In 1923, the Indian Cotton Cess Act created the Indian Central Cotton Committee. The Act authorised the creation of a fund for the improvement and development of the growing, marketing and manufacture of cotton in India. The Coal Grading Board was set up under the Coal Grading

30. R.S. Arora: "Rise of Public Corporation in India", (1961), Public Law, pages 362-363.

31. SS.4-7.

Board Act, 1925, for the grading of coal and for the grant of certificates for coal earmarked for export. In 1930, the Indian Lac Cess Committee was created under the Indian Lac Cess Act for improvement, manufacture and marketing of lac. It is interesting to note that the Government of India Act, 1935, contained a fully-fledged Constitution for the establishment of the Indian Railways Authority which was modelled on the British Corporations and Boards.³² In 1942, the Indian Coffee Board,³³ in 1944, the Indian Central Coconut Committee,³⁴ in 1946, the Indian Central Oilseeds Committee,³⁵ and in 1947, the Indian Rubber Board³⁶ were established. This is, in outline, the history of growth of public corporations in India before Independence. But in this study we propose to deal with the public corporations as they have developed after 1947, when India achieved her independence after a long period of foreign domination. Soon after Independence, in April 1948, the Government of India clearly defined its industrial policy

32. The Government of India Act, 1935, Chapter VIII and the Eighth Schedule.

33. The Coffee Market Expansion Act, 1942.

34. The Indian Coconut Committee Act, 1944.

35. The Indian Oilseeds Committee Act, 1946.

36. The Rubber (Production and Marketing) Act, 1947.

as follows:³⁷

The State has the inherent right to acquire any existing industrial undertaking whenever the public interests require it ...

The management of State enterprises will, as a rule, be through the medium of public corporations under the statutory control of the Central Government, who will assume such power as may be necessary to ensure this.

The year 1948 saw, as a result of this policy statement, an unprecedented growth of public corporations in India. The 1950 Constitution of India, which replaced the Constitution of 1935, has also recognised the institution of public corporations. Article 19(b)(ii)³⁸ of the Constitution specifically refers to :

the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion complete or partial, of citizens or otherwise.

In Article 31(2A), inserted by the Constitution (Fourth Amendment) Act, 1955, there is a reference to corporations "owned or controlled by the State". Until recently, the Government of India has favoured ^{the} public corporation as a form of state enterprise for economic, political and other reasons.

37. Government of India, Statement of the Industrial Policy, 6 April, 1948.

38. Inserted by the Constitution (First Amendment) Act, 1951.

In order to get some idea of the public corporations so far established by the Central Government, a chronological statement stating the purposes for which they have been created is given below:

- (1) The Rehabilitation Financial Administration established under the Rehabilitation Finance Administration Act, 1948. This was created for the purpose of giving financial assistance to displaced persons to enable them to settle in business or industry.
- (2) The Damodar Valley Corporation established under the Damodar Valley Corporation Act, 1948. The Corporation is entrusted with the work of promotion and operation of irrigation schemes, water supply, flood control, navigation, etc. in the Damodar River Valley.
- (3) The Industrial Finance Corporation established under the Industrial Finance Corporation Act, 1948. This Corporation was created for making medium and long-term credit readily available to industrial concerns as might need it, particularly in circumstances in which normal banking accommodation is inadequate.
- (4) The Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948. The Act was passed to provide certain benefits to employees, i.e. sickness benefit, maternity benefit, disablement benefit, dependents' benefit and medical benefit.
- (5) The Central Electricity Authority was set up under the Electricity (Supply) Act, 1948, for a uniform expansion of electric power in India.

- (6) The Central Silk Board established under the Central Silk Board Act, 1948, with a view to providing for the development under central control of raw silk industry.
- (7) The Reserve Bank established under the Reserve Bank of India Act, 1934, and the Reserve Bank (Transfer to Public Ownership) Act, 1948. After the nationalisation, its administration was transferred to a body corporate. It has exclusive powers of control over the banking business in India.
- (8) The Indian Air Lines and the Air-India International established under the Indian Air Corporations Act, 1953. The purpose of their creation was to provide safe, efficient, adequate, economical and properly co-ordinated air transport service, whether internal or international at reasonable charges.
- (9) The Tea Board was set up under the Tea Act, 1953. The Tea Act was passed with a view to providing for the control by the Union of the tea industry and of the export of tea from India.
- (10) The Coal Board was established under the Coal Industry Act, 1953, to take over the control by the Union of the coal industry.
- (11) The State Bank was established under the State Bank of India Act, 1955. The purpose of its creation was to make provision for the rapid extension of rural credit facilities and to transfer to it the undertakings of the Imperial Bank of India.

- (12) Central Warehousing Corporation established under the Agriculture Produce (Development and Warehousing) Corporations Act, 1956.

The functions of the Corporation are to acquire and build godowns and warehouses, to run warehouses for the storage of agricultural produce, and to arrange facilities for the transportation of agricultural produce to and from warehouses.

- (13) The Life Insurance Corporation was established under the Life Insurance Corporation Act, 1956, to take over the life insurance business from private hands and to carry on life insurance business inside and outside of India.

- (14) The River Boards were set up under the River Boards Act, 1956. The Act was passed to provide for the establishment of River Boards for the regulation and development of inter-state rivers and river valleys.

- (15) The Oil and Natural Gas Commission was established under the Oil and Natural Gas Commission Act, 1959. The chief functions of the Commission are carrying out geological surveys for exploration of petroleum, implementation of programme for the development of petroleum resources and sale of petroleum products produced by it.

- (16) The Unit Trust of India was created under the Unit Trust Act of India Act, 1963, because the Government wanted to invest the funds of certain public corporations in the trust and also it was necessary to make special provisions for the benefit of private investors.

(17) The Food Corporation was set up under the Food Corporation Act, 1964.

The purpose of its creation was to undertake the purchase, storage, movement, transport, distribution and sale of food grains and other food stuffs, and also to promote by such means as it thinks fit, the production of food grains and other food stuffs.

The Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969, transferred the fourteen Indian Banks to public ownership. The object of the Act was to make the banking system subserve national priorities and objectives, such as rapid growth in agriculture, small industries and exports, raising of employment levels, encouragement of new entrepreneurs and the development of backward areas. The Fourteen Statutory Corporations have been created by the Government to take over the business of fourteen commercial banks. Every corresponding new bank shall be a body corporate with perpetual succession and a common seal and shall sue and be sued in its name.

3.5 A Classification of Public Corporations

A clear-cut and systematic classification of public corporations is hardly possible. "Like flowers in Spring", says Sir Arthur Street, "they have grown as variously and profusely and with as little regard for conventional patterns. They are even less susceptible of orderly classification: with quasi-governmental bodies, a new species often suggests a new genus".³⁹ This observation applies in the case of Indian Corporations as they differ from each other a great deal in their structure, financing and powers. Any attempt at classifying them is likely to be unsatisfactory. But the classification suggested by various writers on the subject is instructive. Professor W. Friedmann classified public corporations into two types: "the industrial and commercial corporation, on the one hand, and the social service corporation, on the other."⁴⁰ Later a third, termed the supervisory public corporation, was added.⁴¹ Professors Griffith and Street suggested a threefold division into "managerial-economic bodies", "managerial-social bodies", and

39. Sir A. Street: "Quasi-Government Bodies Since 1918" in British Government Since 1918, page 160.

40. W. Friedmann: 10 Mod. L.R. (1947) pages 236-237.

41. W. Friedmann: "The Legal Status and Organization of the Public Corporation" in Law & Contemporary Problems, 1951, page 546.

"regulatory-social bodies",⁴² Professor J.F. Garner,⁴³ as well as D.N. Chester,⁴⁴ have accepted the classification suggested by Professor W. Friedmann. If we add one other category, namely, development corporations to the above, then all the Indian Public Corporations would fall into one of these categories. Commercial corporations are distinguished from development corporations only in one respect that the former act on 'business principles' (i.e. to pay their own way) while the latter do not because the principal motive is not always to make profit as there are other motives like public interest, national planning for economic development, and other national policy considerations. However, the functions of these corporations will be discussed in a later Chapter.

Functionally, Indian Public Corporations may be classified into three classes: (i) Commercial and Industrial Corporations would include the Reserve Bank of India (1948), Air Corporations (1953), Life Insurance Corporation (1956), etc. (ii) Social Service Corporations include The Employees' State Insurance Corporation established in 1948 to provide for

42. Griffith & Street: Principles of Administrative Law (1952), page 271.

43. J.F. Garner: "Public Corporation in U.K.", Government Enterprise, (1970), page 6.

44. D.N. Chester: Political Studies, Vol.I, (1953), page 34.

benefits to employees is the only Social Service Corporation in India.

(iii) The Development Corporations would include the Damodar Valley Corporation, the River Boards, Central Warehousing Corporation, Food Corporation, Tea Board, Rubber Board, etc. The Regulatory Corporations such as Marketing Boards, etc. have been included in this group. The Tariff Commission was set up under the Tariff Commission Act, 1951.

A brief study of the Constitutions of some of the outstanding Corporations will show that the Central Parliament has created different public corporations of varying models.

3.6 Characteristics of Indian Public Corporations

In its 'pure' form, the Indian Public Corporation has the following characteristics:

- (1) Statutory Body. A public corporation is established under an Act of Parliament, i.e. It is a statutory body with perpetual succession and a common seal and can sue and be sued in its own name.⁴⁵ It is unlike an ordinary Corporation or a Joint Stock Company, which comes into being by fulfilling general legal requirements provided in the Company Law. It is a legal entity distinct and separate from the State.
- (2) Independent Governing Board: The business of a public corporation is conducted by an Independent Board. In practice, a Minister is given overall control of the Board. It is the Minister who appoints the members of the Board, although the Act usually specifies their general qualifications. The Act authorises a Minister to give the Board general directions⁴⁶ on matters which appear to him to affect the national interest. In the case of the State Bank of India, the members of Parliament are disqualified for membership of any governing Board. But Ministers do sit on these Boards. The Minister of Labour is the

45. L.I.C. Act, S.3(2).

46. D.V.C. Act, S.48.

ex-officio Chairman of the Employees' State Insurance Corporation,⁴⁷

The Board enjoys freedom in day-to-day administration but some subordination to general policy.

- (3) Self-Contained Finance. The finances of the public corporations are not set aside by the national budget, although they are not free from Treasury control. The public corporations which may be said to possess 'self-contained finance', include the Reserve Bank of India, the State Bank of India and the Life Insurance Corporation of India. Nevertheless, the corporations will have to come back to the Treasury for more capital if and when it is needed. But where a corporation is not self-supporting, it will be dependent on the Government for the source of its revenue, and can also borrow on the open market.
- (4) Disinterestedness. "The public corporation", wrote Mr. Herbert Morrison in 1933,

must be no mere capitalist business, the be-all and end-all of which is profits and dividends, even though it will, quite properly, be expected to pay its way. It must have a different atmosphere at its board table from that of shareholders' meeting; its board and its officers must regard themselves as the high custodians of the public interest. In selecting the Board, these considerations must be in the mind of the Minister. 48

47. E.S.I. Act, S.4.

48. H. Morrison: Socialization and Transport (1933), pages 156-157.

Thus, in the case of the Life Insurance Corporation, the Principal Finance Secretary in the Government of India was appointed concurrently as the Chairman of the Corporation. Whatever advantages of co-ordination may exist in such a scheme, it is clear that it is not a case of disinterestedness.

- (5) No Shares and no shareholders. Professor W. Friedmann says: "The Public Corporation has no shares and no shareholders, either private or public".⁴⁹ The equity is owned by the nation.⁵⁰ However, in India, many of the public corporations have share capital just like Joint Stock Companies. In this category, we find the Industrial Finance Corporation, the Reserve Bank of India, the State Bank of India, and the Central Warehousing Corporation. There are, however, a number of public corporations which do not possess any share capital. This includes the Damodar Valley Corporation, the Employees' State Insurance Corporation, the Rehabilitation Finance Corporation, the Airlines Corporation and the Life Insurance Corporation.
- (6) Freedom from Civil Service Regulations. Professor Hodgetts pointed out that "one of the privileges most cherished by the managers of a public corporation is their freedom from Civil Service regulations in

49. W. Friedmann: "The New Public Corporation", Modern L.R. (10), (1947), page 256.

50. W. Robson: Nationalised Industry and Public Ownership (1962), page 66.

dealing with personnel".⁵¹ In the United Kingdom, the Boards are free from Treasury control over staffing and finance. They engage their own staff, arranging pay and conditions of service directly through employees' Trade Unions or associations. In India, Civil Servants, in fact, are very often appointed as members of the Governing Boards of public corporations. For example, "In 1959, all three members of the Damodar Valley Corporation were Indian Civil Service men, serving on the Board as part-time members, including the Chairman".⁵²

But the State Bank of India is fully free in this respect. It may appoint such number of officers, advisers and employees as it considers necessary or desirable for the efficient performance of its functions, and determine the terms and conditions of their appointment and service.

The Life Insurance Corporation may make regulations regarding the method of recruitment of employees and agents and their terms and conditions of service with the prior approval of the Central Government.

In addition to the above characteristics, several statutes contain a provision that they should act on 'business principles' and ensure the public interest. Thus, the State Bank of India Act, 1955, says that "the Central Board in dis-

51. J.E. Hodgetts: "The Public Corporation in Canada", in the Public Corporation (1954), Friedmann (Ed.), page 78.

52. S.S. Khera: Government in Business, page 81.

charging its function shall act on business principles, regard being had to public interest."⁵³ But whether in practice it is being done or is possible for all public enterprises to do so, irrespective of their objective, is indeed a debatable or doubtful issue. However, we will examine later the statutory powers given to the Boards in the matter of financial responsibilities, such as investment and pricing policies.

53. S.21. This aspect of 'business principles' and 'public interest' received special emphasis in the case of Air Corporations and the Life Insurance Corporation as well.

3.7 Organisation and Management

We will now discuss the Constitutions of some important Public Corporations in India. The question arises: which ones and why?

There are some outstanding Corporations, such as the Reserve Bank of India, which is the central bank of India; the State Bank of India is the most important commercial bank; the Life Insurance Corporation is the only corporation operating in the field of life insurance; the Industrial Finance Corporation provides medium and long-term loans to industries; without considering them, our study will be far from complete. However, we have also included the Employees' State Insurance Corporation, which is the only Social Service Corporation in India. Besides these, we have also chosen for close study the Air Corporations, the Food Corporation, the Oil and Natural Gas Commission, the Damodar Valley Corporation, etc. In fact, we have taken at least one from each type, namely, Industrial and Commercial, Social Service and Development Corporations. Our study will be in two parts. Firstly, we will discuss the statutory provisions and point out the anomalies that exist. Secondly, we will try to enrich the bare legal provisions with some account of what has actually happened in practice.

It will be seen that the Constitution of each corporation is based on a functional basis. For example, the Damodar Valley Corporation closely

follows the pattern of the Tennessee Valley Authority. The purpose of this Corporation is exactly the same as that of the Tennessee Valley Authority. Therefore, the same straightforward Board has been chosen for the Damodar Valley Corporation. Other Corporations generally follow the British models.

Management is the key to the success of a public corporation and personnel is the key to successful management. The hierarchy in the management, in particular, is most important. To choose the right man at the top, to provide him with a suitable organisation, to supply him with adequate resources, to grant him necessary freedom of action, especially on personnel administration, would immensely increase the chance of a successful operation. Since many industries have been brought under public ownership, a great deal of responsibility has fallen on the Central Government to choose the right kind of management for their successful operation and public approval.

Each Corporation has a legal identity and therefore, like ^acompany, has a life of its own, can own property, and sue and be sued in the Courts. The ^{Governing} body has been variously described in the statutes as ^aCommittee, Commission, Board, Corporation or Authority.⁵⁴ The Acts establishing some

54. The Tea Board, the Airlines Corporation, the Employees' State Insurance Corporation, the Oil and Natural Gas Commission, the Damodar Valley Corporation, the Life Insurance Corporation, etc.

Corporations also make provisions for a body known as Board of Directors,⁵⁵ or Central Board,⁵⁶ which may exercise all powers and do all acts and things which may be exercised or done by the body itself. The enacting statutes normally make provisions also for an executive committee and some auxiliaries to implement the purposes of the enactment.⁵⁷

We will now discuss the Constitution of the Central Management Authority and then will consider the Advisory Councils.

(i) Central Management Board

There exists a great deal of diversity in the matter of organisation. In the case of the Industrial Finance Corporation, management is vested in a Board of Directors, which, with the assistance of the Executive Committee and an executive official known as the Managing Director, may exercise all the powers and do all the acts on behalf of the Corporation.⁵⁸ The Executive Committee can deal with any matter within the competence of the Board.⁵⁹

55. S.7(2) Reserve Bank Act, 1934, and S.6, Industrial Finance Corporation, 1948.

56. S.17(2), State Bank Act, 1955.

57. S.30, SBI Act, 1955, S.24, FCI, 1964, S.19(1) LIC Act, 1956.

58. S.6, The Industrial Finance Corporation Act, 1948.

59. *Ibid.*, S.7.

There is an Advisory Committee to assist the Corporation in the discharge of its functions.⁶⁰ The Board of Directors is a composite body which consists of 12 members - a managing director and three other directors nominated by the Central Government, two directors nominated by the Central Board of the Reserve Bank, four directors by other banks, and the remaining two elected by the other shareholders (i.e. Co-operative bank) of the Corporation.⁶¹

^{Board of the} The ^{Corporation} Employees' State Insurance, the only Social Service Corporation in India, consists of the Central Ministers of Labour and Health, one person representing each State of the Union, five persons representing the employees, two persons representing the medical profession, two persons nominated by the Central Government, five persons representing the employees, and two persons selected by the Central legislature.⁶² There is a standing committee of the Corporation, which, subject to the general superintendence and control of the Corporation, is empowered to administer its affairs.⁶³ There is also a Medical Benefit Council to advise the Corporation and its

60. S.8, The Industrial Finance Corporation Act, 1948.

61. Ibid., S.10.

62. The Employees' State Insurance Corporation Act, 1948, S9(c) to (i).

63. Ibid., Sec.18.

various authorities in matters relating to the medical benefit.⁶⁴ The principal officers of the Corporation are the Director-General, Insurance Commissioner, Medical Commissioner, a Chief Accounts Officer and an Actuary, and all are appointed by the Central Government which also fixes their powers and duties.⁶⁵ This Corporation is presided over by a Minister of the Government of India.⁶⁶

It is interesting to note that even the Constitutions of the two banking corporations, namely the Reserve Bank and the State Bank, are not identical. In the case of the Reserve Bank of India, the Central Board of Directors is headed by a Governor, assisted by not more than four Deputy Governors.⁶⁷ There are also fourteen directors and one Government official. All are nominated by the Central Government. Four directors will represent the four local boards constituted under the Act.⁶⁸ The Governor and the deputy Governors are fulltime salaried officers appointed for a renewable term of not more than five years.⁶⁹ Other directors have been given a term of four years, and are eligible for re-nomination.⁷⁰ Subject to regulations

64. The Employees' State Insurance Corporation Act, 1948, SS.18 and 22.

65. *Ibid.*, SS16 and 23.

66. *Ibid.*, S.4.

67. The Reserve Bank of India Act, 1934, S.8(1)(a).

68. *Ibid.*, S.8(1)(b) to (c).

69. *Ibid.*, SS.8(2) and 8(4).

70. *Ibid.*, S.8(4).

made by the Board, the Governor and in his absence, the Deputy Governor nominated by him, shall have powers of general superintendence and direction of the affairs and the business of the Bank, and may exercise all powers and do all acts and things which may be exercised or done by the Bank.⁷¹ The Central Board of the State Bank is considerably larger than the Central Board of the Reserve Bank of India. This is a statutory provision. We have not been able to find out the precise reason for this, but one can argue that, as the State Bank had 3,814^{71a} branches at the end of 1975, whereas the Reserve Bank had one branch in every large city, for efficient management and supervision, the larger Corporation should have a larger board. The Central Board of the State Bank consists of a Chairman and Vice Chairman appointed by the Central Government in consultation with the Reserve Bank.⁷² Other members of the Central Board of the Bank include not more than two Managing Directors⁷³ appointed by the Central Board with the approval of the Central Government, the Presidents⁷⁴ of the Local Boards appointed under sub-section 5 of Section 21 of this Act, not more than four directors

71. Ibid., S.7(3)

71a. Facts about the State Bank of India, published by the Bank in 1975.

72. The State Bank of India Act, 1955, S.19(1)(a).

73. Ibid., S.19(1)(b).

74. Ibid., S.19(1)(bb).

elected in the prescribed manner by the shareholders,⁷⁵ six directors nominated by the Central Government in consultation with the Reserve Bank, from among persons having special knowledge of the working of co-operative institutions and of rural economy or experience in commerce, industry, banking and finance,⁷⁶ one director to be nominated by the Central Government and one director to be nominated by the Reserve Bank.⁷⁷

The Constitution of the Damodar Valley Corporation, which was created for the development of the Damodar Valley and river in the States of Bihar and West Bengal, is a straightforward one. The Corporation consists of a Chairman and two other members appointed by the Central Government after consultation with the State Governments of Bihar and West Bengal, through the territories of which the Damodar river flows.⁷⁸ An important feature of this Corporation is that all the three members are full-time officers of the Corporation and the Corporation in all essentials closely follows the Tennessee Valley Authority model.⁷⁹

The Air Corporations Act, 1953, created two public Corporations,

75. Ibid., S.19(1)(c).

76. Ibid., S.19(1)(d).

77. Ibid., S.19(1)(e) & (f).

78. The Damodar Valley Corporation Act, 1948, S.4.

79. R. W. Singh: Public Corporations in India, page 10.

namely Indian Air Lines and Air India International.⁸⁰ The Constitutions of these two Corporations are simple. The general superintendence, direction and management of the affairs and business of each of the Corporations shall vest in a Board of Directors.⁸¹ The Board of Directors shall consist of a Chairman to be appointed by the Central Government, and not less than eight and not more than fourteen other directors to be appointed by the Central Government.⁸² The same person may be appointed to be the Chairman of both the Corporations or Chairman of one and director of another. It is also provided that the same persons may be appointed to be directors of both the Corporations.⁸³ Each of the Corporations has a Managing Director appointed by it, subject to the approval of the Central Government.⁸⁴ As the situation stands in 1978, Mr. P.C. Lal is the Chairman of the Air India International, but he is neither the Chairman nor a member of the Board of the Indian Airlines Corporation. Therefore, at present, this Section is not in operation.

The affairs of the Life Insurance Corporation shall be managed by a

80. The Air Corporation Act, 1953, S.3(1).

81. Ibid., S.4(1).

82. Ibid., S.4(1A).

83. Ibid., SS.4(1A)(a) and 4(1A)(b).

84. Ibid., S.8(1).

Board consisting of such number of persons not exceeding fifteen as the Central Government may think fit to appoint, and one of them shall be appointed by the Central Government to be the Chairman of the Board.⁸⁵

The Oil and Natural Gas Commission has a very simple organisational structure. The management is entrusted to a Commission which consists of a Chairman and not less than two, and not more than eight, other members appointed by the Central Government.⁸⁶

In the case of the Food Corporation, the relevant Act constitutes a Board of Directors consisting of the following: Chairman; One director representing each of the Ministries of Food, Finance and Co-operation; Managing Director of the Central Warehousing Corporation (ex-officio); Managing Director of the Food Corporation and six other directors. All the directors except the ex-officio director, are to be appointed by the Central Government.⁸⁷

It is significant to note that by far the largest number of Boards have Chairmen appointed by the Central Government.⁸⁸ In addition to

85. The Life Insurance Corporation Act, 1956, S.4(1).

86. The Oil and Natural Gas Commission, 1959, S.4.

87. The Food Corporation Act, 1964, S.7(1).

88. S.4(1), D.V.C. Act, 4(1); Air Corporations Act, S.8(1); R.B. Act, S.15(1); T.F.C. Act, S.8(a); E.S.I. Act, S.4; O & N.G. Comm. Act, S.7(1)(a); F.C.I. Act, etc.

the Chairman, many statutes provide for the office of Vice-Chairman. In the case of the Employees' State Insurance Corporation, the Central Minister for Health is ex-officio Vice-Chairman of the Board.⁸⁹ The Reserve Bank Act makes provision for the posts of Deputy Governors. A Deputy Governor has the right to attend any meeting of the Central Board and take part in its deliberations, but shall not be entitled to vote provided that when the Governor is, for any reason, unable to attend any such meetings, a Deputy Governor authorised by him on this behalf in writing, may vote for him at that meeting.⁹⁰ Similar provision for the office of the Vice-Chairman has been made in the State Bank Act, and he is to be appointed by the Central Government in consultation with the Reserve Bank, and after consideration of the recommendations made by the Central Board in that behalf.⁹¹ The Vice-Chairman shall preside at the meetings of the Central Board in the absence of the Chairman and, subject to the general control of the Chairman, exercise such powers and perform such duties as may be entrusted or delegated to him by the Central Board.⁹² The Chairman is usually appointed for a

89. S.4(b).

90. The Reserve Bank of India Act, 1934, S.8(3).

91. S.B.I. Act, 1955, S.19(1)(a).

92. *Ibid.*, S.28(1).

period of 3-4 years. But in the case of the Air India, Mr. P.C. Lal was appointed for a period of three years and he has been allowed to continue thereafter on the basis of extensions. The extension, no doubt, depends on the relationship between the Minister and the Chairman concerned.

The above provisions in the different statutes reveal that the Central Government exercises a considerable control over the Board of Directors by retaining the power to appoint the members of the Board. The terms and conditions of service of the Chairmen and members of the Boards are specified in the rules framed by the Central Government. The arguments in its favour are that as the members of the Board are appointed by the Central Government, they owe a duty and loyalty to the Government and they are expected to pursue a policy which will be in complete agreement with the Government's general economic and social policy. It could also be argued against it that the officers of Corporations may become places for 'favourite sons' and the appointments could be made without taking into consideration the efficiency, initiative and commercial judgment of the persons concerned. Another danger is that too much interference and influence exerted by the Government officials might convert the Corporation, which is supposed to be autonomous and flexible, into a Government department. So this would defeat the purpose of creating a public corporation.

One writer on the subject rightly remarked that "the officers are not selected because of their intimate knowledge of management or the

problems of the industry concerned but to represent the Ministries or the departments concerned." ⁹³ (The writer did not provide any evidence to this effect).

Various Committees have discouraged the Government from appointing too many officials to the governing boards. On this subject, the Krishna Menon Committee ⁹⁴ recommended that :

the Secretary or any other senior official of the Ministry should not be appointed on a governing board, for they are not able to devote enough time to the problems of the undertakings and there is also a blurring of responsibilities between his responsibilities as Secretary of the Ministry and those by a member of the board. As Secretary, he has to advise the Minister in regard to the affairs of the undertakings, but as a member of the board, he becomes a party to the decision taken there on which he later sits in judgment. The Committee have also suggested that the Chairman of the Board of Directors normally, at the time of his appointment, should be between thirty and forty years so that it does not become the practice that the Chairmanship of boards is a kind of 'berth' for retiring Civil Servants or others, who are appointed to a post as part of a reward for any services they might have rendered to a political party.

93. H.K. Paranjape: Evolving Patterns in the Organisation and Administration of Public Enterprises, 9 I.J.P.A., page 396 (1963).

94. Report of the Sub-Committee of the Congress Party in Parliament - Parliamentary Supervision over State Undertakings, page 12.

The Government declared its intention to accept the report and decided to implement the following recommendations:⁹⁵

- (a) Chairman or Managing Director, one of them only should be full time.
- (b) Secretary of the Ministry or Department should not be appointed to the Board of public enterprises.
- (c) For purposes of co-ordination a representative of the administrative Ministry and the Finance Ministry should be on the Board.
- (d) No officer who is assigned secretariat duties should be^a Director of more than 3 or 4 companies.
- (e) Members of Parliament should not be appointed to the Boards of public enterprises.
- (f) The Directors should no longer have the powers to withhold action on any proposal or a decision taken by the Board for approval of the Central Government. The Chairman alone should have the powers reserving a decision for the President.

In spite of the declaration, no positive step has yet been taken to implement it. On the contrary, in 1963-64, the Estimates Committee⁹⁶

95. Vide Answer to Unstarred Question No.22. Government's decisions on the Committee's recommendations, Lok Sabha Debates, No.20, 1961, Appendix 1, Annexure 3, pages 4-6.

96. The Estimate Committee's functions have been taken over by the Committee on Public Undertakings since 1965. This has been dealt with later.

stated in its report that several undertakings were still headed by the Secretaries, and/or additional Secretaries on a part-time basis; that certain officers ^{are} to be on the boards of as many as eight undertakings and that the boards were generally dominated by the official element.⁹⁷ A similar observation has been made by the Study Team of the Administrative Reforms Commission in 1967. A detailed study of its recommendations has been made in the Chapter on Government Companies in India. According to the study team, seventy percent of the directorships of the Government undertakings were filled by the Civil Servants on a part-time basis. In the case of public corporations, the ratio between the officials and non-officials varies from corporation to corporation. As for example, in the Life Insurance Corporation, only one member is a government official and the rest (fourteen) are non-officials.⁹⁸ The only condition a non-official member has to satisfy ^{is} that he will have no financial or any other interest as is likely to affect prejudicially the performance of his functions as a member thereof.⁹⁹ In the Oil and Natural Gas Commission all the members are official.¹⁰⁰ Officials and non-official members are almost even in the Air Corporations, Food Corporation and Central Warehousing Corporation. The Estimates

97. Estimates Committee, 52nd Report (III L.S.) 6.11.87 (1962-63).

98. LIC Act, 1956, S.4(1).

99. *Ibid.*, S.4(2).

100. O & N.G.C. Act, 1959, S.4.

Committee found out that out of 62 directorship/memberships of these six public corporations, 26 are held by the officials and 36 by non-officials.¹⁰¹

The Administrative Reforms Commission has repeated again that not more than two officials - one from the controlling and the other from the Finance Ministries - should be appointed on the governing boards as the presence of a large number of representatives of Ministries on the boards results in their acquiring the character of a government committee rather than of autonomous bodies.¹⁰²

The Government has accepted the recommendations except that in exceptional cases and for good reasons, the number may be exceeded.¹⁰³ However, our study does suggest that the Government has not violated its commitment yet as there was not any question raised by a member of Parliament in this respect. But it is important to bear in mind that the success of a public corporation depends on the managerial freedom and commercial judgment of the members of the governing board, hence the importance of right selection cannot be denied, and proper safeguard should also be provided so that the appointing authority cannot misuse this power of appointment.

101. Estimates Committee, 52nd Report, pages 27-32.

102. Report, *supra* at pages 96-97.

103. Bureau of Public Enterprises: A Hand Book of Information on Public Enterprises, (1970), page 64.

Friedmann¹⁰⁴ noticed that in countries like Britain, France and India:

the lack of autonomy has been felt in two respects. First, considerations of national prestige or disguised subsidization prevent the Corporation from choosing freely their equipment according to commercial criteria. A well-known example to support this contention was the pressure exercised some years ago on B.O.A.C. to purchase a large number of the excellently designed but commercially doubtful VC10s, in preference to the management's partial choice of American planes.

Another recent example is that of the Concorde, which was designed and developed jointly by Britain and France. The commercial viability of this plane is yet to be proved. "The second is the political pressure, usually through the Minister, to keep prices or tariffs below a level of minimum rentability. Railway tariffs are particularly exposed to this kind of pressure."

Professor A.H. Hanson does not rule out the political interference altogether. He says: "Public enterprise cannot be separated from the governmental system of which it is a part or completely insulated from social and political pressures."¹⁰⁵

104. W. Friedmann: The State and the Rule of Law in a Mixed Economy, (1971), page 58.

105. A.H. Hanson: Public Enterprise & the Civil Service, page 459.

But Mr. A.D. Gorwala is of the opinion¹⁰⁶ that there is no place on the board of an autonomous authority for the representatives of interests. Such a board is not a forum for the settling of points of difference among various interests, each of which pulls its own way; its purpose being good management in the public interest, its responsibilities are not to any sectional groups but to the public as a whole.

Mr. Paul H. Appleby also admits that "a departmental Secretary cannot be an effective Chairman of a large number of Boards - It depends on his ability to think and act one way for a Corporation and another way for the Ministry proper ... Two hats are not likely to be worn with grace if they are too extremely unlike."¹⁰⁷

(ii) Term of Office

Members of the governing body of a public corporation are normally appointed for a limited period. It is generally admitted that the strength of the governing board, to a great extent, depends on the period for which it is appointed. In India, there is no uniformity in respect of the tenure of the

106. Report of the Efficient Conduct of State Enterprises, by A.D. Gorwala, Government of India, Planning Commission (1951), pages 19-20.

107. Paul H. Appleby: Re-examination of India's Administrative System with special reference to Administration of Government's Industrial and Commercial Enterprises, (1956), page 39.

members of the board. The Damodar Valley Corporation Act did not prescribe any tenure of office, it merely says that "the conditions of service of members shall be according to the rules of the Corporation", ¹⁰⁸ but under the DVC Rules, 1948, the Chairman, members, Secretary and Financial Adviser shall be appointed for such terms not exceeding five years as the Central Government may think fit and shall be eligible for re-appointment. In accordance with the recommendation of the A.R.C. the Government has decided that the tenure of appointment of Chairman and full-time directors should be for a period of five years, subject to their performance being satisfactory. ^{108a}

In the case of the Life Insurance Corporation, ¹⁰⁹ the Central Warehousing Corporation, ¹¹⁰ and the Oil and Natural Gas Commission, ¹¹¹ and the Food Corporation, ¹¹² the term of office of members and the manner of filling casual vacancies are to be prescribed by the Central Government

108. SS.5(2) & 59(1), D.V.C. Act, 1948.

108a. A Hand Book of Information on Public Enterprises, page 140.

109. S.48(2), L.I.C. Act, 1956.

110. S.5(1), Central Warehousing Corporation Act, 1956.

111. S.5(1), O & N.G.C. Act, 1959.

112. S.7(4), F.C.I. Act, 1964.

In the exercise of their rule-making power. The Air Corporations Act also prescribes no period of tenure but leaves it to the Government to decide when appointing the person. It says that the Chairman and other members of the Corporations shall ordinarily be entitled to hold office for the period specified in the order of appointment, unless the appointment is terminated earlier by the Central Government.¹¹³

The Governor and the Deputy Governor of the Reserve Bank¹¹⁴ and the Chairman and Vice-Chairman of the State Bank¹¹⁵ hold office for such term not exceeding five years as the Central Government may fix when appointing them and shall be eligible for re-appointment. Certain other directors of the Reserve Bank¹¹⁶ hold office for four years, but the Managing Director of the State Bank¹¹⁷ holds office for five years, and the Government officials nominated by the Central Government in both the Banks¹¹⁸ hold office during the pleasure of the Central Government.

113. S.5(1), Air Corporations Act, 1953.

114. S.8(4), R.B.I. Act, 1934.

115. S.20(1), S.B.I. Act, 1955.

116. S.8(4), R.B.I. Act, 1934.

117. S.20(2), S.B.I. Act, 1955.

118. S.8(4), R.B.I. Act, S.20(4), S.B.I. ACT.

The Industrial Finance Corporation Act specifies that an elected director will hold office for four years.¹¹⁹ The Act also provides that such an elected director cannot be a director for more than two full consecutive terms. In the case of the Employees' State Insurance Corporation, the Minister for Labour is the ex-officio Chairman, and the Minister of Health is the Vice-Chairman, ex-officio. Representatives of the employers, employees, medical profession and Parliament hold office for four years.¹²⁰

Should the members of the Board be elected for a reasonable length of time, it is expected that they may take interest in their job and make a real effort to achieve its objectives. It could also be argued, rightly, that if the members are appointed for a longer time, they may sit back and do nothing. But the Committee on Public Undertakings have found out that in Hindustan Steel it has happened that there were six Chairmen within a period of eight years. According to them, the Chief Executive to get to know the enterprise and make any contribution will need at least a period of three to four years in the enterprise, if not more.¹²¹

Some provisions have been made in some Statutes allowing a member

119. S.11(2), I.F.C. Act, 1948.

120. S.5(1), E.S.I. Act, 1948.

121. Twenty-Eighth Report of PCPU on Hindustan Steel, (III 2S), 1966.

of the Corporation to resign his office.¹²² Normally, if the appointing authority is not satisfied with a member, it has to wait until the term runs out (for example, in the Hindustan Steel), but in a difficult case, pressure is used to vacate before the expiration of his term of office. Generally, the enactments creating public corporations specify provisions for the removal of a member from the board.

In the case of the Reserve Bank of India, extensive power has been vested in the Central Government to remove the Governor, the Deputy Governor or any other Director and also members of local boards.¹²³

But in the case of the State Bank, the Central Government may, after consultation with the Reserve Bank, remove from office the Chairman, Vice-Chairman and any director nominated by them.¹²⁴ The Central Board is

empowered, with the approval of the Central Government, to remove from office a managing director.¹²⁵ A member can also be removed from office, if without leave from the Central Board he absents himself from three consecutive meetings, and he becomes subject to any of the disqualifications specified

122. S.11(6), R.B.I. Act, 1934; S.5(1), Air Corporations Act; S.9(3) F.C.I. Act, 1964.

123. S.11(1), R.B.I. Act, 1934.

124. S.24(1) & S.24(3), S.B.I. Act, 1955.

125. *Ibid.*, S.24(2).

In the relevant Acts.¹²⁶ The Air Corporations Act provides that the appointment of a member can be terminated earlier by the Central Government.¹²⁷

The Damodar Valley Corporation Act covers wider fields for removal. It is provided that the Central Government may remove any member who refuses to act, abuses his position and becomes unsuitable generally to continue as a member. A member may also be suspended pending an inquiry against him,¹²⁸ but a reasonable opportunity should be given to submit his explanation to the charges against him.¹²⁹

We admit that our study has not been able to find a case where a member has been removed from office before his period of tenure has expired. We believe that the usual practice is that when a member does not get on well with the Minister he remains in office until his period of appointment expires. Occasionally, as in the case of the Hindustan Steel, a member is transferred from one Corporation to another until the official period of tenure comes to an end. The Government perhaps is reluctant to use legal powers to remove a

126. S.11(2) & 11(3), R.B.I. Act, S.13m, I.F.C. Act, 1948, S.9(1)(b), F.C.I. Act, 1964.

127. S.5(1), Air Corps. Act., 1953.

128. S.51(1), D.V.C. Act, 1948.

129. *Ibid.*, S.51(3) and (4).

member as this will involve payment of compensation and bad publicity, which may be detrimental to the interest of the Corporation concerned.

(iii) The Size of the Board

The size of the governing board of a public corporation varies from corporation to corporation. Some statutes specifically mention the exact number of members, others only mention the maximum. The Damodar Valley Act specifies that the Corporation shall consist of three members. A similar provision has been found in the case of the State Bank of India Act, the Central Warehousing Corporation Act, the Employees' State Insurance Act, and the Food Corporation Act. These Acts have laid down as to how many members shall constitute the respective governing board of the Corporations. But the Air Corporations Act and the Oil and Natural Gas Commission Act merely prescribe the maximum and minimum number of members that may be appointed to the Boards, Whereas the Life Insurance Act prescribes only the maximum.

It may be suggested that the mere size of a governing board will play a less significant role, so long as the members of the board are composed of men of genius, ability and energy, whose leadership is vitally important for the success of an enterprise.

- 1) The State Bank has the largest board, which consists of Chairman, Vice-Chairman, 2 Directors appointed by the Central Government, Presidents of local boards and some directors appointed by the shareholders, depending on the amount of shareholdings.
- 2) The Food Corporation and the Reserve Bank each has 11 members.
- 3) The Air Corporations should have a minimum of 5 and maximum of 9.
- 4) The Oil and Natural Gas Commission consists of a minimum of 2 and maximum of 10.
- 5) The Life Insurance Act prescribes only a maximum number which is 15.
- 6) The Damodar Valley is the smallest of all, which has 3 members.

(iv) Disqualifications for Membership

No enactments creating public corporations prescribe any qualifications for a person to be appointed to the boards. Moreover, the Air Corporation Act and the Life Insurance Act do not contain any express provision for disqualifications. Both the Acts contain a similar provision, which reads as follows:

- (i) Before appointing a person to be a member, the Central Government shall satisfy itself that the person will have no such financial or other interest as is likely to affect prejudicially the exercise or performance by him of his functions as a member, and the Central Government shall also satisfy itself from time to time with respect to every member that he has no such interest; any person who is, or

whom the Central Government proposes to appoint and who has consented to be a member shall, whenever required by the Central Government so to do, furnish to it such information as the Central Government considers necessary for the performance of its duties under this sub-section. 130

- (11) A member who is in any way directly or indirectly interested in a contract made or proposed to be made by the Corporation shall, as soon as possible after the relevant circumstances have come to his knowledge, disclose the nature of his interest to the Corporation; and the member shall not take part in any deliberation or discussion of the Corporation with respect to the contract. 131

A similar ^{provision} has been inserted in the Oil and Natural Gas Commission Act. 132

As regards disqualifications for membership, the enactments creating the public corporations, like the Reserve Bank, the State Bank, the Damodar Valley Corporation and the Food Corporation, contain express provisions. 133

130. S.4(2), L.I.C. Act, 1956; S.4(2), Air Corprs. Act, 1953.

131. S.4(3), L.I.C. Act, 1956; S.4(3), Air Corprs. Act., 1953.

132. S.6, O & N.G.C. Act, 1959.

133. S.10, R.B.I. Act; S.22, S.B.I. Act; S.4(2), D.V.C. Act; S.8, F.C.I. Act.

The Reserve Bank Act, disqualifies from the directorship or membership of a local board any persons who are salaried officials of Government or employees of banks, or who are at any time or have been adjudged insolvent or have suspended their debts or have compounded with their creditors, or are found to be lunatics or have become of unsound mind or are or have been convicted of any offence involving moral turpitude.¹³⁴ The similar provisions have been incorporated in the case of the State Bank and the Industrial Finance Corporation.¹³⁵

The Damodar Valley Corporation lays down that a person shall be disqualified from being appointed or from continuing as a member of the Corporation if he is a member of Parliament or a State legislature or has any direct or indirect interest in any contract with the Corporation, or in any work done for it, except as a shareholder (other than a director) of a company having the contract or doing the work.¹³⁶ The Reserve Bank Act and the State Bank Act further provide that "the appointment, nomination or election as director or member of a Local Board or of a Local Committee of any person who is a member of Parliament or the Legislature of any State shall be void unless within two months of the date of his appointment, nomination or election he ceases to be a

134. S.10(a) to (e), R.B.I. Act.

135. S.22(b) to (g), S.B.I. Act; S.12, I.F.C. Act, 1948.

136. S.4(2), D.V.C. Act, 1948.

member." 137

As no positive qualifications for membership have been laid down in any statutes, the appointing authority is given an unfettered discretion, and appointments may be made on the basis of other irrelevant qualifications, for example, political patronage, casteism, favouritism, and so on. It is evident from the above statutory provisions that the Government has enormous powers in respect of appointments, removal, etc. Now we confront ourselves with two questions. First, do we need a Board of Directors? Second, what sort of persons are appointed to the Boards?

We believe that there are certain positive functions which only a board of directors can perform. They cannot be discharged so well either by Parliament or by Ministers, even if they had the time to do so. For example, an effective board of directors is expected to undertake the responsibility of certain policy matters; the internal planning and budgetary programme; the organisational policies; the public relations, etc. These are matters purely administrative and technical character which can only be discharged by the competent board of directors.

With regard to our second question, the Government's desire to appoint persons with ability and integrity to the boards, is made clear by

137. S.11(5), R.B.I. Act; S.22(3), S.B.I. Act.

the Minister of Finance in Parliament. The Minister, in answer to a written question enquiring which former M.P.s and Ministers have been appointed as Chairmen of Public Corporations, replied as follows:

No ex-M.P. and ex-Minister is serving as whole-time Chairman of Public Sector Corporations. However, there are some part-time Chairmen who were ex-M.P.s and ex-Ministers but they have been drawn from public life with proven ability in the fields of industrial, commercial or financial enterprise or in administration or trade union activity. They are:

Mr. S.G. Momin: Central Warehousing Corporation.

Mr. R.S. Pantnazar: Cotton Corporation of India.

Mr. D. Sen: Jute Corporation of India.

Mr. P.N. Kathju: Hindusthan Salts Ltd. 138

With respect to the appointment of sitting M.P.s as director of public corporations, the Minister has this to say: "The Government has taken a decision not to appoint Members of Parliament to Boards of Directors of public enterprises."

The reasons for the decision not to appoint Members of Parliament to Boards of Directors of Public enterprises are the same as those given in the Krishna Menon Committee on State undertakings. Extracts from the reports of the Krishna Menon Committee are given below:

The Member of Parliament concerned is part of the organ of public control and is the exponent of public criticism in Parliament. As a Director or part of a concern's administration, he is responsible for the conduct and affairs which Parliament, and therefore, he is called upon to examine, criticise and judge. Having specialised and inside knowledge, he can use it in Parliament and elsewhere, when he has disagreements with his colleagues on the Board and wishes to have a line apart from the team of which he is a member. His colleagues who are not Members of Parliament like himself, cannot reply. They are 'officials' - employed in State undertakings. His Parliamentary colleagues are also at a disadvantage because he purports to speak from expert and inside knowledge. The Minister finds himself in a very embarrassing position when the matter is debated in the House.

There is also further consideration - for whom does he speak? (1) If he speaks for the industry in Parliament he takes the place of the Minister; (2) if he speaks for the Board as Managing Director or Chairman, being one himself, then he has greater facilities which other M.P.s do not have; (3) if he turns critic, he places everyone including the industry, in an adverse position.

It will be understood that such a Member of Parliament, who is not a Member of Government, cannot take over the functions and duties of a Minister. He cannot be a critic for the reasons stated above. Thus, he can neither defend nor criticise, for as Chairman or a Director of the Company concerned he

has access to information which others do not have and which he should not use. Therefore, if a Member of Parliament is Chairman, or even a Director, he would disqualify himself for participation in discussions in regard to the concern he is associated with, and there would be severe limitations in regard to his participation in debates on similar concerns or State concerns as a whole. On the other hand, he cannot be obliged to sit in Parliament unconcerned when the debate is on matters of which he has knowledge. This, in effect, would prevent him from functioning fully as a Member of Parliament. If, on the other hand, he were to use his position and his knowledge, then he places the concern of which he is an active and responsible part and the Board at a great disadvantage as well as in a position of embarrassment. His colleagues and the concern are not represented in Parliament except through the Minister. Conflicts will arise as to whom the Minister represents. 139

It is appropriate to mention here the important recommendations that the Krishna Menon Committee made. The Krishna Menon Committee, which was set up in 1958, to consider the problems relating to State-owned corporations and companies and to suggest how a broad supervision may be maintained by Parliament without interference in the day-to-day activities of the concerns, made a number of far-reaching suggestions covering the management of State enterprises, the Chairmanship and Directorships on

Boards of Management, relationships between Ministers and the Management of an undertaking and accountability to Parliament.

It is gratifying to note that a Cabinet Sub-Committee, headed by Mr. Morarji Desai, carefully considered the Krishna Menon Committee's Report and announced that the recommendations were broadly acceptable to the Central Government.¹⁴⁰

As regards the problem of governmental control over the public enterprises, the Krishna Menon Committee's solution lies in the setting up of a third Committee of Parliament, something very similar to the Estimates Committee and the Public Accounts Committee that already exist. In accordance with the Committee's recommendation, the Committee on Public Undertakings was set up in May, 1964, to examine the working of Public Undertakings. The functions of this Committee have been dealt with later.

Next, the Krishna Menon Committee suggests that the Chairman of this Board of Management, who has the ultimate responsibility, should have the power to overrule the Board or to exercise his discretion, without prior consultation of the Board, if he thinks that it is essential in the interests of the Company.¹⁴¹ This certainly introduces a good deal of arbitrariness

140. S.S. Khera: Government In Business, page 70.

141. Ibid.

and might have the result of completely crushing the autonomy of the Boards of Management and of making them mere tools in the hands of the Chairman and through him, the Minister. However, this is an internal affair of an enterprise and the chances, therefore, to come out in the open are very slim.

On the issue of the relationship between the Minister and the Chairman of such Boards, the Committee takes a pragmatic view. It says that:

It is neither possible nor advisable to lay down the occasions or the categories of occasions when a Minister should or should not issue a directive or special directive. Obviously if such directives are issued, the Minister must accept fuller responsibility appropriate to the content of the directive. In any event, his overall responsibility remains and he cannot divest himself of it under cover of delegation by directives. This does not mean, however, that the interference of Ministers in the concern's day-to-day affairs or even in its general policy for internal planning should be the usual practice. 142

The question of issuing directives has been discussed in a separate section later in this Chapter. We feel, however, the autonomy of State enterprises becomes more restricted under the Krishna Menon Committee's suggestions.

It is a healthy sign that the M.P.s are not only concerned with the sort of persons appointed to the Boards, but also anxious to know the terms

142. Krishna Menon Committee's Report on State Undertakings, page 17.

and conditions fixed by the Government for appointment of Chairmen of Public Undertakings. When a question was asked in Parliament in this respect, the Minister for Finance replied that:

Part-time Chairmen drawn from public life are allowed a monthly consolidated honorarium of Rs.1000/- or daily allowance at the rates applicable to M.P.S. Subject to a limit of Rs. 1000/- p.m. They are also allowed travelling allowance, medical benefits, use of Company's car, telephone and free accommodation, subject to a ceiling of 35% of the maximum of the schedule applicable to the Managing Director of the Company. The full-time Chairmen of public undertakings are allowed pay in the following scale:
 Schedule A: 3500-125-4000. For example, the Chairman of the Food Corporation, the Oil and Natural Gas Commission, etc.; Schedule B: 3000-125-3500 - the Chairman of the National Coal Development Corporation, the National Industrial Development Corporation, etc.; Schedule C: 2500-100-3000, the Chairman of the National Projects Construction Corporation, the Indian Telephone Industries, etc.; Schedule D: 2000-100-2500, the Chairman of the National Small Industries Corporation, Hindustan Salts Ltd. ¹⁴³

This classification is made on the basis of their importance to the economy and the complexity of their problems. ¹⁴⁴

143. Lok Sabha Debates, 4 May, 1973, Vol. 27, page 117.

144. A Hand Book of Information on Public Undertakings, page 141.

(v) Advisory Councils

There is also a provision in several public corporations for the setting up of advisory councils. But no uniform pattern has been followed in this regard. We will mention the statutory provision first.

The Damodar Valley Corporation Act provides that the Corporation may appoint one or more advisory committees for the purpose of securing the efficient discharge of the functions of the Corporation, and in particular for securing that these functions are exercised with due regard to the circumstances and requirements of particular areas.¹⁴⁵

The Industrial Finance Corporation Act also lays down that there may be an advisory committee to assist the Corporation in the discharging of its functions.¹⁴⁶

The Reserve Bank Act contains a provision for the setting up of four local boards for the Eastern, Western, Northern and Southern areas. Each of these boards consists of 5 members nominated by the Central Government to represent the territorial and economic interests and the interests of the co-operative and indigenous banks. Their function is to advise the Central Board on such matters as may be generally or specifically referred to it and to perform such duties as the Central Board may delegate to it.¹⁴⁷

The Life Insurance Act says that

145. S.10, D.V.C. Act, 1948.

146. S.8, I.F.C. Act, 1948.

147. S.9(1) & 9(4), R.B.I. Act, 1948.

the Corporation may constitute for each zone an advisory committee for the purpose of advising the zonal manager in respect of such matters as are referred to it under the regulation made by the Corporation.¹⁴⁸ In addition to the advisory committee for each zone, the Corporation is empowered to constitute for each zonal office an Employees and Agents Relations Committee, which is to advise the zonal manager on matters which relate to the welfare of the employees and agents of the Corporation, or which are likely to promote and secure amity and good relations between them and the Corporation.¹⁴⁹

The advisory committee of the Rehabilitation Finance Corporation is constituted by the Central Government, the function of which is to advise the administration on matters of policy.¹⁵⁰

The Employees' State Insurance Corporation Act provides for an advisory body on its Medical Benefit Council, whose function is to advise the Corporation and its various authorities in matters relating to the medical benefit and other connected matters.¹⁵¹

In addition to the above, the body has the power and right of investigation in relation to complaints against medical practitioners in connection with medical treatment and attendance.¹⁵²

The Air Corporations Act, contains a provision for the

148. S.22(2), L.I.C. Act, 1956.

149. S.22(3), L.I.C. Act, 1956.

150. S. 5, R.F.A. Act, 1948.

151. S.18, E.S.I. Act, 1948.

152. *Ibid.*, S.22.

constitution of an Air Transport Council consisting of a Chairman and not more than 11 members appointed by the Central Government.¹⁵³ The functions of the Council are to consider and investigate any matter of significance concerning the air services, referred to it by either of the Corporations, Director-General of Civil Aviation, Director-General of Post and Telegraph, or the Central Government, and to give advice and make recommendations about it. Such advice and recommendations are specifically contemplated in the matter of fare and freight rates and policy generally.¹⁵⁴ The Act also lays down that each of the Corporations shall constitute a Labour Relations Committee, consisting of representatives of the Corporation and of its employees, and it shall be the duty of the Labour Relations Committee to advise the Corporation on matters relating to the welfare of the employees, or which are likely to promote and secure amity and good relations between the two.¹⁵⁵

In the case of the Food Corporation, the Committee or Committees are appointed by the Central Government in consultation with the Corporation.¹⁵⁶ The functions of the Committees are to advise the Central Government or the Corporation in regard to any matter connected with the purposes of this Act in respect of which its advice is sought by the Central Government or, as the case

153. S.30, Air Corprns. Act, 1953.

154. S.31, Air Corprns. Act, 1953.

155. *Ibid.*, S.41(2).

156. S.11(1), F.C.I. Act, 1964.

may be, by the Corporation.¹⁵⁷

In accordance with section 10, the Damodar Valley Corporation has, in fact, constituted two advisory committees to examine the water potential of the Damodar Valley Corporation and suggest suitable plans for the use of resources for the best possible advantage of irrigation, power and other purposes, keeping in view the problem of flood control. However, it is unfortunate that their report is not available.¹⁵⁸ Similarly, the Life Insurance Corporation has also constituted advisory boards for the purpose of advising the Zonal Managers and Employees and Agents Relations Committee.¹⁵⁹

The Air Corporations have fulfilled the legal requirements by appointing an advisory committee as well as a Labour Relations Committee.¹⁶⁰ The Industrial Finance Corporation has also constituted an advisory committee to deal with any matter subject to the direction of the Board.¹⁶¹

But the Food Corporation did not set up any advisory committee until 1973. The Committee on Public Undertakings recommended in its report of

157. S.11(2), F.C.I. Act, 1964.

158. V.V. Ramanadham: Control of Public Enterprise, page 260.

159. *Ibid.*, page 260.

160. *Ibid.*

161. *Ibid.*

1973-74 on the Corporation ¹⁶² that the

Advisory Committee may be set up at local level so that matters of local interests may be resolved in consultation with representatives of all concerned by producers, co-operatives, etc. The Minister for Agriculture replied that advisory committees at regional level now exist in most of the States.

If this Committee performs its functions satisfactorily, the existence of such a committee may be supported on the grounds of efficiency and public accountability.

162. 42nd Report on the Food Corporation by CPU, 1973-74, page 42.

CHAPTER 4

PUBLIC CORPORATION AS AN INSTRUMENT OF STATE POLICY (Cont'd.)

- 4.1 Legal Powers and Functions of Corporations
- 4.2 Borrowing Power of Corporations
- 4.3 Disposable Profits
- 4.4 Maintenance of Accounts
- 4.5 Provision for *audit*
- 4.6 Status of Employees
- 4.7 Public Controls over Corporation
- 4.8 Ministerial Control in Britain
- 4.9 Ministerial Control in India
 - (i) Appointment and Removal
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 - (iv) Financial Control
 - (a) Capital
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- 4.10 Parliamentary Control
 - (i) Questions
 - (ii) Debates
 - (iii) Parliamentary Committees
- 4.11 Legal Status
- 4.12 Judicial Control
 - (i) Liability in Tort and Contracts
 - (ii) Mandamus
 - (iii) Availability of Fundamental Rights

4.1 Legal Powers and Functions of the Corporation

We will now examine the powers and functions clauses of certain important public corporations. The general pattern is to set out a general "powers" clause followed by a clause specifying a number of particular activities which the public corporation will be empowered to carry out, without prejudice to the generality of the powers granted in the section as a whole.

The Damodar Valley Corporation Act,¹ The Life Insurance Corporation Act,² the Oil and Natural Gas Commission Act,³ and the Food Corporation Act⁴ followed the same pattern of a general powers clause followed by a detailed account of specific powers, without prejudice to the scope of the general powers.

In the Air Corporation Act,⁵ the enumeration of specific powers clause is preceded by a general powers clause running as follows:

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1. S.22(2), D.V.C. Act, 1948.
 2. S.6(2), L.I.C. Act, 1956.
 3. S.14(2), O & N.G.C. Act, 1959.
 4. S.13(2), F.C.I. Act, 1964.
 5. S.7(2), Air Corps. Act, 1953.

Subject to the rules, if any, made by the Central Government in this behalf, it shall be the function of each corporation to provide safe, efficient, adequate, economical and properly coordinated air transport services, whether internal or international or both, and the Corporation shall so exercise their powers as to secure that the air transport services are developed to the best advantage and, in particular, so exercise those powers as to secure that the services are provided at reasonable charges. 6

The Rehabilitation Finance Administration Act, the Industrial Finance Act and the Reserve Bank Act, do not provide any general powers clause but define the powers of the Corporations by way of enumeration only,⁷ though under one of the enumerated heads the Corporation is empowered "generally, to do all such matters and things as may be incidental to or consequential upon the exercise of its powers or the discharge of its duties under the Act."⁸

An attempt will now be made to mention the specific functions and powers of a few outstanding Indian Corporations.

6. S.7(1), Air Corps. Act, 1953.

7. SS.12, 14 & 17, Re.Fin.Adm. Act, 1948; SS.23, 25 & 29, I.F.C. Act, 1948; S.17, R.B.I. Act, 1934.

8. S.12(c), R.F.A. Act; S.23(1), I.F.C. Act; S.17(16), R.B.I. Act,

As has been said earlier, the Damodar Valley Corporation was set up for the development of the Damodar Valley in the States of Bihar and West Bengal, so it has been granted substantial powers in order to achieve this goal. The Damodar Valley Corporation Act specifically lays down that "the Corporation shall have the power to do anything which may be necessary or expedient for the purpose of carrying out of the functions under this Act."⁹

The Industrial Finance Corporation provides medium and long-term credit to industrial concerns, particularly in circumstances in which normal banking accommodation is inadequate. The services provided by it include the guaranteeing on such terms and conditions as may be agreed upon, loans raised by industrial concerns, the underwriting of the issue of stocks, shares, bonds or debentures and the granting of loans or advances or subscribing to debentures of industrial concerns repayable within a specified period.¹⁰

In the case of default in repayment on the part of an industrial concern, the Corporation is empowered¹¹ to take over the management of the concern or sell and realise property pledged, mortgaged or hypothecated. It has also the power to ask for discharge in full forthwith of any loan granted by it in spite of any agreement to the contrary regarding the period of payment.

9. S.22(1), D.V.C. Act, 1948.

10. S.23(1), I.F.C. Act, 1948.

11. S.28(1), *Ibid.*

The Life Insurance Corporation Act, 1956, has authorised the Corporation to carry on life insurance business, to invest funds in such manner as the Corporation may think fit and to take all such steps necessary or expedient for the protection and realisation of investments, to acquire, hold and dispose of any property for the purpose of its business, to transfer the whole or any part of the life insurance business carried on outside India, to advance and lend money upon the security of any movable or immovable property, to borrow or raise money and to carry on any other business which may be conveniently carried on in connection with its business and calculated directly or indirectly to render profitable, and to do all such things as may be incidental or conducive to the proper exercise of any of the powers of the Corporation.¹² It has also the power to modify contracts of life insurances in certain cases entered into before 19 January, 1956.¹³

The Food Corporation is empowered to undertake the purchase, storage, movement, transport, distribution and sale of food grains and other foodstuffs,¹⁴ and with the previous approval of the Central Government, it is also authorised to promote by such means as it thinks fit the production of food grains and other foodstuffs, to set up, or assist in the setting up of, rice mills, flour mills and

12. S.6(1) & 6(2)(a) to (i), L.I.C. Act, 1956.

13. *Ibid.*, S.14.

14. S.13(1), F.C.I. Act, 1964.

other undertakings for the processing of food grains and other foodstuffs and to discharge such other functions as may be prescribed or as are supplemental, incidental or consequential to any of the functions conferred on it under this Act.¹⁵ It has also the power to enter into agreements for purchase of food grains after harvest.¹⁶ The Corporation is also authorised to guarantee any loan borrowed by a grower of foodcrops and any other loan realised by a grower of foodcrops, which is repayable within a period not exceeding five years.¹⁷

The Employees' State Insurance Corporation created by the Employees' State Insurance Act, 1948, is to provide certain benefits for employees in case of sickness, maternity, and employment injury, etc.¹⁸ It has been empowered to promote measures for the improvement of the health and welfare of insured persons and for the rehabilitation and re-employment of insured persons who have been disabled or injured and may incur in respect of such measures expenditure from the funds of the Corporation within such limits as may be prescribed by the Central Government.¹⁹

15. Ibid., S.13(2)(a) to (c).

16. Ibid., S.29(1).

17. Ibid., SS.29(2) & 30.

18. S.46, E.S.I. Act, 1948.

19. Ibid., S.28(XI).

The Air Corporations Act, 1953, has established two air Corporations, namely, Indian Air Lines and Air-India International, each of the Corporations is empowered to operate any air transport service in their respective fields and to carry out all forms of aerial work, to acquire, hold and dispose of movable and immovable property, to repair, overhaul, reconstruct, assemble or recondition aircraft, to enter into and perform all such contracts as are calculated to further the efficient performance of its duties, to determine and levy fares and freight rates and other charges for or in respect of the carriage of passengers and goods on air transport services, to take such steps to promote the interests of the Corporation or to improve the services, to take all such steps as may be necessary or convenient for, or may be incidental to, the exercise of any power, or the discharge of any function or duty conferred or imposed on it by this Act.²⁰ It is also provided that these powers are not to be construed as authorising the disregard by the Corporation of any law for the time being in force.²¹

The functions of the Oil and Natural Gas Commission as laid down by the Oil and Natural Gas Commission Act, 1959, are to plan, promote, organise and implement programmes for the development of petroleum resources

20. S.7(2)(a) to (i), Air Corps. Act, 1953.

21. *Ibid.*, S.7(3).

and the production and sale of petroleum and petroleum products.²² The Act also lays down that the Commission may take such steps as it thinks fit for the carrying out of geological and geophysical surveys for exploration of petroleum, for the carrying out of drilling to prove and estimate the reserves of petroleum, to undertake such other activities as may lead to the establishment of such reserves and its refining, for the transport and disposal of natural gas and refinery gases, to undertake scientific investigations, to undertake the collection and publication of statistics and monographs, to perform any other function which is supplemental, incidental or consequential to any of the functions aforesaid or which may be prescribed.²³

The powers and functions of the Banking Corporations have been provided in such detail in the enactments creating them that only a short summary can be attempted in this study. The Reserve Bank was brought under public ownership and control in 1948 by the Reserve Bank (Transfer to Public Ownership) Act, 1948. It was established with a view to regulating the issue of bank notes and the keeping of reserves in order to secure monetary stability and to operate the currency and credit system of the country to its advantage. The Bank is a body corporate having perpetual succession and a common seal

22. S.14(1), The Oil & Natural Gas Commission Act, 1959.

23. *Ibid.*, S.14(2)(a) to (h).

and it may sue and be sued in its own name.²⁴ Since nationalisation, the functions of the Reserve Bank were further enlarged by the Reserve Bank (Amendment) Acts.²⁵ The Act says that the:

Bank shall be authorised to carry on and transact the several kinds of business as specified below:-²⁶

(1) the accepting of money on deposit without interest from, and the collection of money for the Central Government, the State Governments, local authorities, banks and any other persons; the purchase, sale and rediscount of bills of exchange and promissory notes; the purchase from and sale to scheduled banks of foreign exchange; the making to any scheduled bank or State co-operative bank, of loans and advances; the making to any State Financial Corporation established under the State Financial Corporations Act, 1951, as well as I.F.C. of loans and advances repayable on the expiry of fixed periods not exceeding eighteen months from the date of such loan or advance; the making to any financial institution notified by the Central Government in this behalf, of loans and advances; the making to the Unit Trust of loans and advances; the making to the

24. S.3(2), R.B.I. Act, 1934.

25. The Reserve Bank (Amendment) Acts, 1949, 1951, 1953, 1955, 1956, 1957, 1959, 1960, 1961, 1962, 1963, 1964, 1966, 1968, 1973, 1974.

26. Ibid., S.17.

Warehousing Corporation, the Deposit Insurance Corporation, the Agricultural Refinance Corporation, the Development Bank, the Central Government and the State Governments of loans and advances; the purchase and sale of securities of the Central Government or a State Government; the purchase and sale of shares in or the capital of the Agricultural Refinance Corporation, the Deposit Insurance Corporation, the Development Bank, the State or any other bank or financial institution notified by the Central Government in this behalf; the keeping of deposits with the State Bank for such specific purposes as may be approved by the Central Government; the custody of monies, securities and any other articles of value; the sale and realisation of all property which may in any way come into the possession of the Bank; the acting as agent for the Central Government or any State Government or any local authority or the Industrial Finance Corporation; the purchase and sale of securities issued by the Government of any country outside India; the opening of an account with or the making of an agency agreement with, and the acting as agent or correspondent of, a bank incorporated in any country outside India; participation in any arrangement for the clearing and settlement of any amounts due from, or, to any person or authority on account of the external trade of India with any other country; the borrowing of money for a period not exceeding one month for the purpose of the business of the Bank; the making and issue of bank notes subject to the provisions of this Act; the exercise of powers and functions and the performance of duties entrusted

to the Bank under this Act, or under any other law for the time being in force; the providing of facilities for training in banking and for the promotion of research, where, in the opinion of the Bank, such provision may facilitate the exercise of its powers and functions, or the discharge of its duties; generally, the doing of all such matters and things as may be incidental to or consequential upon the exercise of its powers or the discharge of its duties under the Act.

The State Bank of India was created by the State Bank of India Act, 1955, which took over the assets and liabilities of the Imperial Bank of India. It was established for the extension of banking facilities on a large scale, more particularly in the rural and semi-urban areas and other public purposes. The State Bank acts as the agent of the Reserve Bank for paying, receiving, collecting and remitting money, bullion and securities on behalf of any Government in India, and for undertaking and transacting any other business which the Reserve Bank may from time to time entrust to it.²⁷ It may enter into negotiations for acquiring the business, including the assets and liabilities of any banking institution, with the sanction of the Central Government.²⁸ The other types of business²⁹ which the Bank is empowered to transact are

27. S.32(1)(a) & (b), The State Bank of India Act, 1955.

28. Ibid., S.35(1).

29. Ibid., S.33.

the following:-

(1) the advancing and lending of money and the opening of cash credits upon the security such as stocks, funds, securities, debentures, goods, other assets, accepted bills of exchange, promissory notes, fully paid shares of companies, etc.; the selling and realisation of the proceeds of sale of any promissory notes, debentures, bonds, shares, etc.; the drawing, accepting, discounting, buying and selling of bills of exchange and other negotiable securities; the investing of the funds of the State Bank upon any of the securities mentioned above; the keeping or maintenance of deposits or cash accounts with any banking institution; the issuing of demand drafts, telegraphic transfers and other kinds of remittances made payable out of its own offices; the buying and selling of gold and silver whether coined or uncoined; the receiving of deposits and keeping cash accounts on such terms as may be agreed upon; the receiving of all kinds of bonds, scrips, title deeds or valuables on deposit for safe custody; the acting as agent of any co-operative bank; the acting as agent for the Central Government or any State Government or any Corporation in implementing any scheme for financing the constructing of dwelling houses; the underwriting of the issues of any stocks, shares and debentures; the transacting of pecuniary agency business on commission; the entering into contracts of indemnity, suretyship or guarantee with specific security; the administration, whether alone or jointly, of estates for any purpose as executor

or trustee; the buying of bills of exchange payable out of India; the borrowing of money for the purpose of the Bank; the advancing or lending of money to, or the opening of cash credit in favour of, any company having a share capital which is expressed in rupees or any Society registered under the Co-operative Societies Act, 1912; the advancing and lending of money to Courts of Wards upon the security of estates; the subscribing to buying, acquiring or holding, and the selling of any shares in or capital of any banking institution; the subscribing to, buying, acquiring, holding or selling of any shares or debentures of any financial institution as may be notified by the Central Government; contributing to the initial capital of the Unit Trust of India; the advancing or lending money to, or discounting or purchase of any negotiable instrument on behalf of persons engaged in such industries as may be specified by the Central Board; the advancing or lending money to any co-operative housing society; the subsidising from time to time of the pension funds; the establishment and maintenance of superannuation pension, provident or other funds for the benefit of the employees; the doing of any other kind of business which the Central Government may authorise; the performance of the functions entrusted to, or required of, the Bank by this Act or by any other law for the time being in force and generally, the doing of all such matters and things as may be incidental or subsidiary to the transacting of the various kinds of business, including foreign exchange business, specified in the Act. The kinds of busi-

ness the State Bank cannot transact are provided in detail in Section 34 of the State Bank of India Act, 1955, e. g. the Bank shall not make loan or advance -

- (a) upon the security of stock or shares
- (b) upon the security of any immovable property or the documents of the title relating thereto, etc.

A similar provision is also found in the Reserve Bank Act, 1934.³⁰

It should be pointed out that the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969, which has established the fourteen public Corporations to take over the assets and liabilities of fourteen commercial banks, does not provide any detailed account of the powers and functions, but does contain provisions for the appointment of a board of directors³¹ to manage the affairs of each Corporation.³²

The above are the bare legal provisions of some of the outstanding Corporations' powers and functions, as outlined in the respective Statutes. It is true, no doubt, that an elaborate and detailed provision regarding the powers and functions will be of immense value to members of the governing

30. S.19, R.B.I. Act, 1934.

31. S.10(2), The Banking Companies (Acquisition & Transfer of Undertakings) Act, 1969.

32. Ibid., SS.7(1) to (4), S.8 and S.9.

board. However, we will now discuss whether these Corporations have been able to perform their functions satisfactorily for which they were set up by Parliament.;

The Reserve Bank of India, in addition to its role as the Central bank of the country, is the guardian of the State Bank of India, the Industrial Finance Corporation and the various commercial banks.

The Reserve Bank's power of supervision and control have greatly increased since the passing of the Indian Banking Companies Act of 1934 and its amendments in 1956 and 1962. Under the Reserve Bank (Amendment) Act, 1956, the Reserve Bank was authorised to change the reserve ratios from 5 percent to 20 percent, in the case of demand deposits, and from 2 per cent to 8 percent in the case of time deposits. Since the passing of the 1962 Amendment Act, the Schedule banks were required to maintain with the Reserve Bank an average daily balance of 3 percent of their total time and demand liabilities as against the previous requirement of 5 percent of demand and 2 percent of time liabilities. The cash reserve ratio was raised from 3 percent of the total of demand and time liabilities to 5 percent at the end of May, 1973, and further to 7 percent in September. But again, from July, 1974, the banks are required to keep only 5 percent of their demand and time liabilities as cash reserve with the Reserve Bank. The Reserve Bank, since the passing of the Banking Companies Act, has been vested with powers for both qualitative and selective

credit controls which have been used, since the middle of 1956, for the purpose of ensuring controlled monetary expansion.³³

Section 35A introduced by the Reserve Bank (Amendment) Act, 1957, provides:

- (1) Where the Reserve Bank is satisfied that
 - (a) in the national interest; or
 - (b) to prevent the affairs of any banking company being conducted in a manner detrimental to the interests of the depositors or in any manner prejudicial to the interests of the banking company; or
 - (c) to secure the proper management of any banking company generally;
 it is necessary to issue directions to banking companies generally or, to any banking company, in particular, it may, from time to time, issue such directions as it may deem fit, and the banking companies or the banking company, as the case may be, shall be bound to comply with such directions.

During the period July, 1971, to 1972, a directive was issued to effect certain changes by the Reserve Bank in respect of the scheduled commercial banks' advances against raw cotton and kapas, food grains, oilseeds and vegetable oil, including Vanaspathi in the context of their respective supply positions and their effect on prices. In view of the difficult supply and price

33. This information is contained in a leaflet published by the Reserve Bank of India, in 1975.

position of food grains, oilseeds and edible oils during the period July, 1972, to June, 1973, the Reserve Bank tightened the control on advances against these commodities by issuing a fresh directive.³⁴ Further, the Reserve Bank has played a significant role in the development of rural credit facilities. Two grant funds were established by the Reserve Bank (Amendment) Act, 1955, to make advances to co-operative credit institutions:

- (1) the National Agricultural Credit (Long-term operations) Fund in February, 1956; and
 - (2) the National Agricultural Credit (Stabilization) Fund in June, 1956.
- On 30 June, 1975, these funds stood at Rs. 125 crores and 15 crores respectively.³⁵

The State Bank undertakes ordinary commercial banking business and provides credit to agriculture, industry, trade and commerce.

The Bank's assistance to agriculture both direct and indirect, declined from Rs. 122.37 crores in 1970 to Rs. 88.77 crores in 1971, and thereafter, showed a rising trend and stood at Rs. 241.21 crores in 1975.

The number of small-scale industries accounts rose from 25 in 1956 to 87,716 at the end of December, 1975, and the total finance provided by

34. Dwelt and Varma: Indian Economics, (1976), page 451.

35. 'Leaflet' published by the R.B.I.

the State Bank Group to small-scale industries rose from Rs.11 lakhs in 1956 to Rs.320 crores at the end of December, 1975.

The Bank has opened 419 new offices in 1975 as against 375 offices in the preceding year, bringing the total number of offices to 3,814 at the end of 1975. Of the new offices, 334 were located in rural and semi-urban areas, 54 at urban and 31 at metropolitan centres. As many as 152 were located in areas with a population below 5,000 and 81 were in unbanked blocks. Of the 1,06,493 employees on the rolls of the Bank at the end of 1975, 8,807 (8.3%) belonged to scheduled castes and tribes (i.e. Untouchables). The share of candidates belonging to these communities in the fresh intake went up from 12.8% in 1974 to 25.5% in 1975.³⁶ This is in line with the Government's policy for the uplifting of the Untouchables. However, one important ^{piece of} information is missing in the leaflet which is how much profit the Bank has made, and the rate of dividend declared in the year 1974-75.

The Industrial Finance Corporation was established for the purpose of making medium and long-term loans to industrial concerns.

The authorised share capital of the Corporation is twenty crores. The paid-up capital was raised to Rs.8.35 crores in 1964. It is important to note that the Corporation, in 1962, with a view to increasing its resources, made a

36. A Leaflet published and printed by the State Bank of India.

public issue of $4\frac{1}{2}$ percent twelve-year bonds for Rs.6 crores. Again in 1965, the Corporation made a private sale of bonds for Rs.2 crores. It increased its funds during 1974-75 by floating bonds of the value of Rs.19 crores in the market. The total amount of outstanding bonds at the end of March 1975, stood at Rs. 98.2 crores.

During the financial year 1974-75, the Industrial Finance Corporation consisted of 41 new projects for an aggregate amount of Rs.20.1 crores. Again, of the projects assisted during 1974-75, 29 were in notified backward districts, involving an aggregate amount of Rs.12.6 crores or 40% of the total assistance sanctioned during the year. The total financial assistance to 20 projects promoted by new entrepreneurs and 8 projects in the Co-operative sector aggregated to Rs. 4.9 crores and Rs.4 crores, respectively. The amount disbursed against loans during 1974-75 rose by 5.4 crores and stood at Rs.37.3 crores. The total financial assistance sanctioned by the Corporation since its inception in July 1948, up to the end of March 1975, amounted to Rs, 496.4 crores. During the twenty-seven years of its existence, the Corporation has made^a valuable contribution towards accelerating the process of industrial growth.^{36a}

The Food Corporation was constituted in 1964 but started functioning

36a. See Dwett and Varma: Indian Economics.

from 1 January, 1965. The Food Corporation is the sole agency of the Central Government for the State trading (purchase and sale) in food grains. It procured about 69.5 lakh tons of food grain out of the 1972-73 crop. The storage capacity available with it at the end of 1973 was 78.2 lakh tons. The Food Corporation is regarded as the first organised attempt to take up State trading in food on an appreciable scale. It is important to note that the Government took over the wholesale trade in wheat from March, 1973. This produced serious dislocation in normal trade channels. As a result, the Government had to abandon the policy of takeover of wholesale trade in grain.

The value of sales made by the Corporation recorded increased from Rs.384.62 crores in 1968-69 to Rs. 567.20 crores in 1969-70.³⁷ The gross profit after providing for depreciation, was Rs.15.41 crores, more than double the previous year's gross profit of Rs. 6.82 crores.

The Corporation has undertaken a programme of constructing 24 rice mills with the object of modernising rice mills and increasing the output of rice from available paddy.

The Oil and Natural Gas Commission was set up to undertake the exploration, exploitation and refining of mineral oil in India.

37. This is the latest figure we could obtain. See A Hand Book of Information on Public Undertakings, (1970.)

Three oilfields were discovered by the Oil and Natural Gas Commission during the Second Plan period (1956-61). During the last 19 years, the Oil and Natural Gas Commission has been making efforts to find oil wherever there is a possibility of locating oil. The Oil and Natural Gas Commission in April, 1974, struck oil in the Bombay High area - at a point about 105 miles from the coast. The deposits may well be around 4 billion tons, that Bombay High may yield oil worth Rs. 60,000 crores. This is obviously good news for India as she was experiencing an oil crisis because of a price rise by the major oil producing countries in the world. In fact, there has been a fourfold increase in international prices of crude oil. As a result of that, India is passing through a terrible energy crisis.

We also wanted to consider the performance of the Life Insurance Corporation and the Air Corporations, but unfortunately, the recent statistics are not available.

4.2 The Borrowing Power of the Corporation

It has become usual to insert a provision in the respective Acts permitting borrowing from other sources with the previous approval of the Central Government, and in some cases, the Reserve Bank. Most of the Indian Corporations have been entrusted with the power to borrow money by the parent Statutes.³⁸ With the approval of the Central Government, the Damodar

Valley Corporation may borrow money in the open market or otherwise.³⁹

The Industrial Finance Corporation is empowered to borrow money by issue of bonds and debentures, but the amount so raised must not exceed at any time more than five times the amount of the paid-up share capital and the reserve fund of the Corporation.⁴⁰

The bonds and debentures issued by it are guaranteed by the Central Government as to the repayment of principal and the repayment of interest at such rate as may be fixed by the Government on a recommendation of the Board of Directors set up by the Industrial Finance Act.⁴¹ The Corporation is also authorised to borrow foreign currency

38. S.29(3), E.S.I. Act, 1948; S.10(3), Air Corps. Act, 1953; S.6(2), L.I.C. Act, 1956; S.21, I.F.C. Act, 1948; S.20, O & N.G.C. Act, 1959; S.27(1), F.C.I. Act, 1964.

39. S.42, D.V.C. Act, 1948.

40. S.21(1), I.F.C. Act, 1948.

41. S.21(2), *Ibid.*

through the International Bank for reconstruction purposes.⁴² The two Air Corporations, with the consent of the Central Government, or in accordance with the terms of any general authority given to them by the Central Government, may borrow money for all or any of the purposes of the Corporation and secure the payment of any money borrowed by it or any interest thereon by the issue of bonds, debentures, debenture-stock or any mortgage or charge or other security on the undertaking of the Corporation or any part of it or on any of its properties.⁴³

The Central Warehousing Corporation may, in consultation with the Reserve Bank and with the previous approval of the Central Government, borrow money, but the borrowings should not at any time exceed ten times the amount of the paid-up share capital and the reserve fund of the Corporation.⁴⁴

The Life Insurance Act, 1956, provides in simple terms that the Corporation may borrow or raise any money in such manner and upon such security as it may think fit.⁴⁵ With the previous approval of the Central Government, the Oil and Natural Gas Commission may borrow money in the open market or otherwise for the purposes of carrying out its functions

42. S.27, *ibid.*

43. S.10(3) (a) & (b), Air Corpn. Act, 1953.

44. S.37(1), C.W.C. Act, 1956.

45. S.6(2)(f), LI.C. Act, 1956.

under this Act.⁴⁶ The Food Corporation, on the other hand, may borrow money only either from any scheduled bank or from any other bank or financial institution approved by the Central Government against stocks of food grains or other foodstuffs held by it.⁴⁷ The loans and advances taken by the Food Corporation are guaranteed by the Central Government as to the repayment of principal and the repayment of interest thereon and other incidental charges.⁴⁸ As the 'Annual Report' is not available here, we were unable to find out whether the Corporation has borrowed any money in the open market recently. Neither matter has been raised in Parliament.

46. S.20, O. & N.G.C. Act, 1959.

47. S.27(1), F.C.I. Act, 1964.

48. S.27(2), ibid.

4.3 Disposable Profits

Theoretically, the public corporations exist to provide a public service, not to make a profit, and this will involve sometimes providing essential but uneconomic services which a private corporation may be reluctant to provide. The general policy of the government, therefore, is to ensure that the public corporations are run economically, efficiently, as far as possible, so that they can pay their way.

Some statutes⁴⁹ creating commercial and industrial public corporations provide that the corporations shall act as far as may be on 'business principles'. That being so, these corporations are expected to operate at a profit.

A specific provision has been inserted regarding the disposal of profits in many statutes.⁵⁰

The Damodar Valley Corporation is expected to make profits out of its irrigation, power and flood[^]Control projects, and these profits are liable to income-tax like those of private companies.⁵¹ After providing for depreciation, reserve and other funds, the net profits of the three kinds

49. S.6(3), L.I.C. Act, 1956; S.6(2), I.F.C. Act, 1948; S.17(2), S.B.I. Act, 1955; S.9, Air Corprns. Act, 1953.

50. S.37, D.V.C. Act, 1948; S.32, I.F.C. Act; S.40, S.B.I. Act, S.33(1), F.C.I. Act, 1964; S.47, R.B.I. Act, 1934.

51. S.43, D.V.C. Act, 1948.

of projects have to be credited to the participating governments (i.e. Central Government, West Bengal and Bihar) in proportion to their respective shares in the total cost of the projects concerned. Likewise, net deficits have to be made good by the participating governments proportionately.⁵²

The Life Insurance Corporation Act, 1956, provides that "in the discharge of any of its functions the Corporation shall so far as may be act on business principles," but for the disposal of the surplus there is a provision to the effect that "not less than 95 per cent of such surplus shall be allocated to or reserved for the policy holders of the Corporation".⁵³ The Central Board of the State Bank is to act on 'business principles' regard being had to public interest.⁵⁴ An identical provision is found in the Industrial Finance Act, 1948.⁵⁵

The balance of the profits of the Reserve Bank and the State Bank is to be paid to the Central Government, after making provision for bad and doubtful debts, depreciation in assets, contributions to staff and superannuation funds and for all other matters for which provision is to be made or which

52. SS.39 and 40, D.V.C. Act, 1948.

53. S.28, L.I.C. Act, 1956.

54. S.17(2), S.B.I. Act, 1955.

55. S.6(2), I.F.C. Act, 1948.

are usually provided for by bankers.⁵⁶ In the case of the State Bank, the rate of dividend declared by the State Bank is fixed by the Central Board,⁵⁷ but in the case of the Industrial Finance Corporation, the rate of dividend under no circumstances is to exceed the rate of 5 per cent.⁵⁸

The balance of profits, in the case of the Food Corporation, is to be paid to the Central Government after making provision for bad and doubtful debts, etc.⁵⁹

56. S.47, R.B.I. Act, 1934, and SS.38 & 40(3), S.B.I. Act, 1955.

57. S.38(2), S.B.I. Act, 1955.

58. S.32, I.F.C. Act, 1948.

59. S.33(2), F.C.I. Act, 1964.

4.4 Maintenance of Accounts

Some statutes contain provisions regarding maintenance of accounts. The Air Corporations Act provides that:

the Corporation shall maintain proper accounts and other relevant records and prepare an annual statement of accounts including the profit and loss account and the balance sheet in such form as may be prescribed by the Central Government in consultation with the Comptroller and Auditor-General of India. ⁶⁰

A similar provision has been inserted in the Damodar Valley Corporation Act, 1948. ⁶¹ But the Industrial Finance Corporation ⁶² and the State Bank ⁶³ are required to furnish a more detailed statement of accounts. Section 40 of the State Bank Act lays down that:

the State Bank shall furnish to the Central Government and to the Reserve Bank within two months from the date on which its accounts are closed and balanced its balance sheet, together with the profit and loss account and the auditors' report on the working of the State Bank during the period covered by the accounts.

60. S.15(1), Air Corps. Act, 1953.

61. S.47, D.V.C. Act, 1948.

62. S.35, I.F.C. Act, 1948.

63. S.40, S.B.I. Act, 1955.

The balance sheet and the profit and loss account shall be signed by the Chairman, Vice-Chairman, Managing Directors, if any, and a majority of the other directors.

The State Bank shall also, within two months from the date on which its accounts are closed and balanced, transmit to the Central Government and the Reserve Bank a statement showing, as far as may be available, the name, address and occupation of, and the number of shares held by, each shareholder of the State Bank as on the said date. A very similar provision is found in the Industrial Finance Corporation Act. It must also furnish to the Central Government and the Reserve Bank at least once in every year, or as frequently as the Central Government or the Reserve Bank may require, a classification of its loans and investments, and of loans guaranteed by it and underwriting agreements entered into by it.⁶⁴

The Food Corporation Act, 1964, provides that:

the Corporation shall maintain proper accounts and other relevant records and prepare an annual statement of accounts including the profit and loss account and the balance sheet in such form as may be prescribed. ⁶⁵

64. S.35, I.F.C. Act, 1948.

65. S.34(1), F.C.I. Act, 1964.

A similar provision in identical terms exists in the Oil and Natural Gas Commission Act, 1959.⁶⁶ The statements, i.e. Trading Account, Profit & Loss Account and Balance Sheet are usually prepared by the qualified accountants. It is expected, therefore, that they all will follow the standard procedure as set out by the Indian or British Institute of Chartered Accountants.

66. S.22(1), O & N.G.C. Act, 1959.

4.5 Provision of Audit

The real purpose of having accounts examined and audited by an auditor is to check financial irregularities and to know the true financial position of an undertaking. However, the general duties of a commercial auditor are to safeguard the interests of the shareholders and to see that there is no irregularity in the dealings of the directors with the property of the company. It is very difficult to state exactly how far an auditor is bound to carry his investigations and the position has been summed up by saying, it is his duty to be a 'watch-dog' and not a 'blood hound', meaning that he is bound to be on the alert to detect anything suspicious but not bound to investigate every transaction until his suspicions are aroused.

In order to safeguard the interests of the general public, whose money, in fact, has been invested in the various Government undertakings, there is a provision in almost all the statutes creating public corporations, which provides that "the accounts of every Corporation shall be audited annually". It should be pointed out that the Indian statutes do not provide any uniform system of audit.

The accounts of the Employees' State Insurance Corporation,⁶⁷

67. S.34(1), E.S.I. Act, 1948.

and the Industrial Finance Corporation⁶⁸ are audited by auditors appointed by the Central Government. In the case of the Life Insurance Corporation, auditors are appointed by the Corporation itself with the previous approval of the Central Government.⁶⁹ Whereas in the case of Air India,⁷⁰ Indian Air Lines Corporation,⁷¹ and the Oil and Natural Gas Commission,⁷² the accounts of the Corporations are audited annually by the Comptroller and Auditor-General of India.

There are provisions in the enactments creating the Industrial Finance Corporation,⁷³ the Life Insurance Corporation⁷⁴ and the Food Corporation⁷⁵ prescribing that auditors appointed to audit the accounts of the Corporation must be duly qualified to act as auditors of Companies under Section 226 of the Companies Act, 1956.

68. S.34(1), I.F.C. Act, 1948.

69. S.25(1), L.I.C. Act, 1956.

70. S.15(2), Air Corps. Act, 1953.

71. S.15(2), ibid.

72. S.22(4), O & N.G.C. Act, 1959.

73. S.34(1), I.F.C. Act, 1948.

74. S.25(1), L.I.C. Act, 1956.

75. S.34(2), F.C.I. Act, 1964.

In the case of the Damodar Valley Corporation, auditors are appointed in such manner as may be prescribed by rules in consultation with the Comptroller and Auditor-General.⁷⁶

The affairs of the State Bank are to be audited by two auditors duly qualified to act as auditors of companies under Section 226 of the Companies Act, 1956, who will be appointed by the Reserve Bank in consultation with the Central Government.⁷⁷ Whereas in the case of the Reserve Bank, auditors are appointed by the Bank itself but their remuneration is fixed by the Central Government.⁷⁸

Some statutes contain specific provisions which provide that auditors have power to examine the annual balance-sheet, profit & loss account, vouchers and other books of account.⁷⁹ In addition to the above power, auditors of the Industrial Finance Corporation and the State Bank may, in relation to such accounts, examine any director or any member of a Local Board or of a Local Committee or any officer of the Corporations.⁸⁰ Auditors of the Employees' State Insurance Corporation enjoy a similar power.⁸¹

76. S.47, D.V.C. Act, 1948.

77. S.41(1), S.B.I. Act, 1955.

78. S.50(1), R.B.I. Act, 1934.

79. S.34(2), E.S.I. Act, 1948; S.34(2), I.F.C. Act, 1948; S.15(3) Air Corps. Act, 1953; S.25(2), L.I.C. Act, 1956; S.34(4), F.C.I. Act, 1964; S.41(6), S.B.I. Act, 1955.

80. S.34(3), I.F.C. Act, 1948; S.41 (b)(c), S.B.I. Act, 1955.

81. S.34(2), E.S.I. Act, 1948.

Professor V.V. Ramanadham rightly observed that:

audit of accounts of statutory corporations carrying on a commercial activity by the Comptroller and Auditor-General appears to be objectionable. His traditions and methods of auditing are different from those of commercial auditors, and there is a danger that while auditing the accounts of the Corporations, he may apply the principles of government audit rather than of commercial audit and this may create difficulties for the persons managing commercial enterprises who may have to take initiative and use discretion in various matters. 82

The present position is that the Government has decided to set up an Audit Board for the audit of public enterprises. It should be under the jurisdiction and control of the Comptroller and Auditor-General. The structure and function of this institution has been discussed in the Chapter on Government Companies.

82. V.V. Ramanadham: The Structure of Public Enterprises in India, (1961), pages 162-163.

4.6 What is the Legal Status of Employees?

The majority of the statutes establishing public corporations provide that the corporations may appoint such number of officers and employees as it considers necessary for the efficient performance of its functions. The methods of appointment, the functions and the conditions of service will be such as may be determined by regulations made by the corporation under the Act.⁸³

The Administrative Reforms Commission, (1967) was of the opinion that all appointments below the board level should be made by the board itself, except that the appointments of chief executive of the undertaking and its financial adviser should be made by the board in consultation with the government.⁸⁴

The Government has now decided⁸⁵ that the public enterprises will be competent both to create posts, and to make appointments thereto, irrespective of pay, for all posts below the board level (excluding only

83. S.23(1) & (2), L.I.C. Act, 1956; S.12(1) & (2), O & N.G.C. Act, 1959; S.8, Air Corps. Act, 1953; S.12(2) & (3), F.C.I. Act, 1964.

84. Report, supra at page

85. A Hand Book of Information on Public Undertakings, (1970), pages 150-151.

the General Managers of Constituent Units) without any reference. The appointments of Financial Advisers will also be made by the Boards. But in the appointment to posts carrying scale of Rs.2500-3000 and above, of persons above 58 years in age, approval of Government, however, would be required.

The public corporations in common law jurisdiction have followed the rule that their employees should not have the status of Civil Servants.⁸⁶ The significance of this, says Professor Robson, is that there is no control by the Treasury or the Civil Service Commission, or even Parliament, over remuneration, conditions of service and establishment questions generally.⁸⁷

The employees of the public corporations in India as well, do not enjoy the status of Civil Servants because a public corporation has a separate legal and independent existence and is distinct from the Union or the State Government with its own property and its own fund. The position is now firmly established by the various High Courts that an employee of the Life Insurance Corporation,⁸⁸ or of the State Bank,⁸⁹ or of the Damodar Valley

86. W. Friedmann (Ed.): Government Enterprise (1970), page 317.

87. W.A. Robson: Nationalised Industry and Public Ownership (1962), page 67.

88. R.B. Rathaur v. D.M., LIC, AIR (1961) All.502.

89. S. Mukherjee v. SIB, AIR (1962) Cal. 72.

Corporation⁹⁰ or of the State Transport Corporation,⁹¹ is not considered a Civil Servant and, therefore, is not entitled to the protection against dismissal or reduction in rank guaranteed under Article 311 of the Constitution.

It is relevant to note that though some statutes confer on their employees the status of public servants for certain purposes, for example, Section 50 of the Damodar Valley Corporation Act, 1948, provides that the employee of the Corporation "shall be deemed, when acting or purporting to act, in pursuance of any of the provisions of the Act, to be public servants within the meaning of Section 21 of the Indian Penal Code", even the presence of such a clause in a statute/^{would not bring the servants of a public corporation} within the meaning of Article 311 of the Constitution of India.

According to Section 121 of the Indian Penal Code, the words "public servant" mean an officer of the Government whose duty it is, as such officer, to prevent offences, to give information on offences, to bring offenders to justice, or to protect the public health, safety or convenience. This Section also covers every officer, whose duty it is to take, receive, keep or extend any property on behalf of the Government or to execute any revenue process or to investigate or to report on any matter affecting the pecuniary

90. R. Ghosh v. DVC, AIR (1960) Cal. 549.

91. Mafatlal v. D.C., STC, AIR (1966), S.C. 1364.

Interests of Government or to make, authenticate, or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of any law for the protection of the pecuniary interests of Government and every officer in the service or pay of Government, or remunerated by fee or commission for the performance of any public duty.⁹² It has also been stated in the Penal Code that persons falling under any one of the above descriptions are "public servants" whether appointed by the Government or not. However, it is submitted that even if this wider definition of "public servant" is held to include the servants of the Corporation within its ambit, the judicial test by the Supreme Court for considering the validity of a claim for such privilege (i.e. Civil Servant) will discourage any claim on behalf of the Corporation and its employees. It is hoped that the Courts will refuse to uphold such claim when made on behalf of the Corporation.

92. S.21, Clause (9) of the Indian Penal Code.

4.7 Public Controls over Public Corporations

In the economic field, the Indian Constitution requires the State to bring about a fair and just distribution of ownership and control of the means of production, prevent concentration of wealth in the hands of a few, and eliminate all types of exploitation of workers.⁹³ In order to achieve these objectives the Government's participation in industry and commerce was inevitable. The principal reasons for vesting the ownership and control in autonomous public corporations, instead of bringing them under the normal departmental management, was to encourage a spirit of initiative and enterprise. Socialization is perhaps the greatest ideal of a public corporation.

The Corporations are supposed to enjoy a certain degree of autonomy and flexibility and are free from interference in their internal matters. But it has been mentioned earlier that too much interference by the Government would reduce the status of a public corporation to that of a Government department, it is equally true that too little interference would place it outside the democratic regime. No country which has used this instrument as an organ of Government policy has denied the right of ministerial control over it. But the degree of control varies from one country to another. It is generally admitted that the control has been necessary to regulate the rate

93. Articles 39 - 51.

of capital development of these corporations; to make known the wishes of the Government, which guarantees most of their capital; to prevent the Board from becoming complacent and unenterprising and to see that the decisions are in harmony with the Government's economic and social policy. If these enterprises are left completely free, they might become the "headless fourth branch of the Government".⁹⁴

(a) Mr. Herbert Morrison, the Chief architect of the modern corporation, has expressed the following view regarding the relationship which should exist between Ministers and Boards:

Clearly it is desirable that the Minister should keep himself familiar with the general work of the Board or Boards with which he is concerned. It is wise for him with his Parliamentary Secretary and principal officers concerned from time to time to meet the Chairman and, indeed, the members of the Board, to discuss matters of mutual interest either formally or informally. On such occasions both the Board and the Minister will be conscious of their legal rights: the legal right of the Minister to give general directions or to withhold approvals, and the legal rights of the Board within the field of day-to-day management; but it is also desirable that such discussion should be free, frank, forthcoming, and co-operative.⁹⁵

94. Davies: Administrative Law Treatise (1958), Vol.1, page 281.

95. H. Morrison: Government & Parliament, (1954), page 264.

4.8 Ministerial Control in Britain

In post-War nationalizing statutes in Britain, it seems clear that ministerial control over public corporations has shown a tendency towards increasing. In the case of the pre-1945 corporations, the Minister had no power to issue directions of policy; the Chairman and members of the governing board were not removable by the Minister at will, and there was less ministerial control in matters of finance and audit than in the case of the post-1945 corporations.⁹⁶ Chester is of the opinion that "the wide powers given to Ministers in recent nationalization legislation open the way to comfortable back-seat driving, so reducing the responsibility and discretion and, therefore, ultimately, the calibre of the board of management."⁹⁷ He has suggested that there should be a clearer division of responsibility between the Minister and the board, so that the corporation can run on sound business principles. Even today, ministerial control over corporations is confined to the following matters only:-

- (a) The Minister appoints the members of the boards of public corporations, determines their salaries and conditions of service, and has power to terminate their appointments;

96. D.N. Chester: The Nationalised Industries (1952), pages 13-14.

97. *Ibid.*, pages 42-43.

- (b) The Minister can issue general policy directions to the Corporations;
- (c) Capital investment and borrowing by the Corporation require ministerial approval;
- (d) The Minister appoints the auditors of the accounts of the Corporations, and the form of the Accounts and Annual Reports are subject to his approval;
- (e) The Minister's approval is required for a Corporation's programmes for research and development, pension, and training schemes for the staff; and
- (f) The Minister has considerable powers in relation to the Consumer Councils associated with some of the Corporations.⁹⁸

The specific powers of the Minister are normally provided in a statute, but in practice, a Minister goes beyond his statutory powers and often informally meets the members of the board and gives policy directions over a lunch-table or behind closed doors. This practice has invited criticism from Professor W. Robson; he said that:

the Ministers should not be permitted to remain in the twilight zone in which some of them love to dwell, flitting happily from one private meeting to another, talking things over with the Chairman at lunch, in the club, in the House of Commons, in the department, without

98. H. Morrison: Government & Parliament (1954), pages 260-261.

disclosing either to the public or to Parliament the real extent of their intervention. 99

It needs to be pointed out that the Minister has a statutory power to give general directions, but it is very often not done openly. A typical provision regarding this runs as follows: "The Minister shall have power to give the board directions of a general character as to the exercise of its functions on matters appearing to him to affect the national interest." 100 The power to issue general directions has been rarely used, e.g. it has never been in use in relation to any board for which the Minister of Power is responsible, nor by the Minister of Transport under the Transport Act, 1962 (although it was used twice during the fifteen years during which the 1947 Act was on the Statute Book). 101

Recently, it was disclosed in the House of Commons that the Secretary of State for Industry, Mr. Varley, did issue directives to the Chairman of the British Steel Corporation to cover up the financial loss suffered by the Corporation (1978).

99. W.H. Robson: Nationalized Industry and Public Ownership (1960), page 162.

100. S.3(1), Coal Industry Nationalisation Act, 1946; S.11, Post Office Act, 1969.

101. C.D. Drake: "Public Corporation as an Organ of Government Policy" in the Government Enterprise, Friedmann (ed.), page 32.

4.9 Ministerial Control in India

There appear to be no diverse views of the necessity for ministerial control over a public corporation, the argument is over the degree of control and the manner of its exercise. Ministerial control may be conducted through various devices. Let us now examine the statutory powers that are available to the Minister concerned and the extent to which they are used to exert influence on the Chairman and the members of the governing board of a corporation.

(i) Appointment and Removal

The Minister can appoint and remove the Chairman, directors or members of the board, and the managing directors, a task which gives the Minister considerable power. As no positive qualifications for membership are laid down, the Minister is free to find the best persons and appoint them. The grounds of removal may include refusal to work, incapacity for acting, abuse of position, general unsuitability,¹⁰² or any reason which may appear to be sufficient.¹⁰³ The State Bank Act, 1955, provides that the Central Government has the power to remove, after consultation with the

102. S.51, D.V.C. Act, 1948.

103. S.8, R.F.A. Act, 1948; S.11(1), R.B.I. Act, 1934; S.9(1) & (2), F.C.I. Act, 1964.

Reserve Bank, the Chairman and the Vice-Chairman and any director nominated by them.¹⁰⁴ These powers are exercisable only on the ground specified in the enactments. The various statutes confer a regulation-making power on the corporations, but the power is exercisable subject to the previous approval of the Central Government.¹⁰⁵

As there is no provision in the statutes in respect of the ineligibility of a member for re-appointment, the Central Government have the power to re-appoint members at the end of their terms of office. Such a power in the hands of Ministers, no doubt, encourages members to show their allegiance to the appointing authority and at the same time, the re-appointment which depends upon the ministerial goodwill may have an adverse effect on freedom of action.

(ii) Dissolution

In certain statutes, the Central Government has been given power of dissolution and liquidation. The Oil and Natural Gas Commission Act, 1959,¹⁰⁶ empowers the Central Government to dissolve the Commission

104. S.24(1) & (3), S.B.I. Act, 1955.

105. S.49, L.I.C. Act, 1956; S.42, C.W.C. Act, 1956; S.32(1), O & N.G.C. Act, 1959; S.45(1) & (2), F.C.I. Act, 1964.

106. S.30(1) & (2), O & N.G.C. Act, 1959.

and also provides that on such declaration, all assets, liabilities and obligations vested in the Commission shall vest in the Central Government and all members shall vacate their offices as members of the Commission. It is noticeable that enactments creating public corporations like the Life Insurance Corporation, the Employees' State Insurance Corporation, the Air Corporations, the Reserve Bank, the State Bank and the Food Corporation, do not contain any provision in respect of dissolution. We are unable to find any special reason for this. The Damodar Valley Corporation Act, 1948, only confers on the Central Government the power to remove the Chairman and the members of the Corporation and appoint a Chairman and members in their places.¹⁰⁷

Several statutes provide a specific provision for liquidation. A typical provision is S.38 of the Life Insurance Corporation Act, which provides:

No provision of law relating to the winding up of companies or corporations shall apply to the Corporation established under this Act, and the Corporation shall not be placed in liquidation save by order of the Central Government and in such manner as that Government may direct. 108

107. S.51(6), D.V.C. Act, 1948.

108. S.38, L.I.C. Act, 1956; S.37, I.F.C. Act, 1948; S.57, Reserve Bank Act, 1934; S.45, State Bank Act, 1955; S.43, F.C.I. Act, 1964.

(iii) Directions

Almost all the statutes creating public corporations have conferred on the Central Government the powers to give directions on matters of general policy. This has been provided in the statutes perhaps to strike the right balance between the governmental power and the autonomy of the public corporations.

These directions are usually of a general character but the Corporations are bound to follow these instructions and to shape their policies in accordance with them. Thus, the Life Insurance Corporation Act, 1956, provides that:

In the discharge of its functions under this Act, the Corporation shall be guided by such directions in matters of policy involving public interest as the Central Government may give to it in writing and if any question arises whether a direction relates to a matter of policy involving public interest the decision of the Central Government thereon shall be final. 109

A similar provision exists in the Damodar Valley Corporation Act, 1948.¹¹⁰

The directions laid down in the Air Corporations Act, 1953, are more specific

109. S.21, L.I.C. Act, 1956.

110. S.48, D.V.C. Act, 1948.

Section 34(1) lays down that "the Central Government may give to either of the Corporations directions as to the exercise and performance by the Corporation of its functions and the Corporation shall be bound to give effect to any such directions", and Section 34(2) provides that :

the Central Government may, if it is of opinion that it is expedient in the national interest so to do after consultation with the Corporation concerned, direct either of the Corporations -

- (a) to undertake any air transport service or other activity which the Corporation has power to undertake;
- (b) to discontinue or make any change in any scheduled air transport service or other activity which it is operating or carrying on;
- (c) not to undertake any activity which it proposes to do.

The Government may also direct the transfer of any air service or property from one of the Air Corporations to the other.¹¹¹

In the case of the Rehabilitation Finance Corporation, the Central Government may give such 'general or special' directions as it thinks fit.¹¹²

Failure to comply with the Government's directions may entail¹¹³ supersession¹¹³ of the Board of Directors

111. S.39, Air Corps. Act, 1953.

112. S.19, R.F.A. Act, 1948.

113. S.6(5), I.F.C. Act, 1948.

In the case of the Industrial Finance Corporation, and removal¹¹⁴ of the Chairman and the members in the case of the Damodar Valley Corporation. In certain cases, the Central Government may give directions on policy matters after consultation with some authority. Thus, the Central Government may from time to time, give such directions to the Bank as it may, after consultation with the Governor of the Bank, consider necessary in the public interest.¹¹⁵ The State Bank Act, 1955, provides that the Bank shall be guided by such directions in matters of policy involving public interest as the Central Government may, in consultation with the Governor of the Reserve Bank and the Chairman of the State Bank, give to it.¹¹⁶ It also provides that all directions given by the Central Government shall be given through the Reserve Bank.¹¹⁷

The Central Government is empowered to supersede the Board of Directors of the Reserve Bank, and the Corporation and the Standing Committee in the case of the Employees' State Insurance Corporation, if they fail to carry

114. S.51(6), D.V.C. Act, 1948.

115. S.7(1), R.B.I. Act, 1934.

116. S.18(1), S.B.I. Act, 1955.

117. S.18(2), S.B.I. Act, 1955.

out the obligations imposed on them by these Acts.¹¹⁸

The power to issue general directions has been rarely used.¹¹⁹

As the board of management is appointed by the Minister, he can achieve his objectives through discussion and pressure, without giving in writing a formal direction. The Minister and the Secretary of the department concerned are in actual practice, able to exercise a greater degree of control over the undertakings than what is formally envisaged by the statutes.¹²⁰ The Estimates

Committee has also drawn the attention to the authority in this regard. It stated in its report that:¹²¹

... the relations between these undertakings and the Ministry, the former are treated in the same manner as Departments and Offices of Government controlled and supervised by the Secretariat. The State undertakings have thus become adjuncts to Ministries and are treated more or less on the same lines as any subordinate organisation or office. The

118. S.30, R.B.I. Act, 1934.

119. S.21, E.S.I. Act, 1948. T.R. Sharma: The Working of State Enterprise in India (1970), page 80. (In 1965-66, only two directives appear to have been issued, one to the Life Insurance Corporation and the other to the Indian Drugs and Pharmaceuticals Ltd. However, he did not give any further details).

120. Administrative Reforms Commission Study Team, Report, at page 65.

121. Estimates Committee - 16th Report (I.L.S.) (1954-55), page 4.

Committee deplore this tendency which has had a harmful effect on the productive activity of the undertakings as these have been subjected to all the usual red-tape and procedural delays common to a government department with serious consequential effect on production.

A similar observation has been made by the Chagla Commission, appointed to investigate certain matters regarding the Life Insurance Corporation:

In my opinion, Section 21 (of the Life Insurance Corporation Act, 1956) embodies the ideal compromise between the autonomy of a Statutory Corporation and the control which must be exercised by a welfare state over such a corporation, while leaving the Corporation complete independence to manage its own day-to-day administration, while leaving it free to invest its funds in the interests of the policy holders, Government could only control its discretion when a question of policy involving public interest arose ... In my opinion, it is most unfortunate that the wise and sound principle laid down in Section 21 has not been adhered to in the working of the Life Insurance Corporation. The evidence before me ... clearly shows that there was a tendency on the part of the Finance Ministry to look upon the Corporation as a wing or branch of that Ministry and to issue orders to it in the belief that the Corporation was bound to carry out those orders. ¹²²

122. Chagla Commission: Report on the Life Insurance Corporation, (1958), page 36.

It may be suggested that the Corporations can function efficiently and successfully provided the Minister's directives are confined to the matters of policy only and the informal ministerial control is kept to the very minimum. The Administrative Reforms Commission has rightly remarked that:

It would be a sanguine rule that in order to preserve the autonomy of the Undertakings, informal controls are minimised and important policy decisions are contained in written directives which are published in the annual reports of the Undertakings so that responsibility for the same may be placed squarely on the Ministry. 123

It is relevant to mention that in Britain the actual practice regarding 'directives' is that the directions issued by the Ministers to the Corporations have to be published in the annual reports unless the Minister advises that it would be detrimental to the national interest to do so.

India's position in this regard is very similar to that of Britain. Where the Government considers it necessary to issue a directive to a public enterprise asking it to act in a manner different from that dictated by the economic considerations, this should be in writing, and this fact should specifically find a mention in the annual report of the concerned public enterprise.¹²⁴

123. Administrative Reforms Commission, Report on Public Sector Undertakings, 31 (1967).

124. A Hand Book of Information on Public Undertakings, page 151.

In answer to a written question enquiring whether a directive has been issued to the management of public undertakings on wage revision or improvement of service conditions, the Minister for Finance stated as follows:

The inflationary pressures which developed in 1971 have since been accentuated by the drought, floods, etc., in various parts of the country during 1972. In this context, Government felt that proposals for general wage revisions in the Central Government industrial and commercial enterprises should be viewed in the broader context of the economy as a whole taking into account their wider repercussions. Government have, therefore, decided that general revision of wages or increase in fringe benefits in these enterprises should be done in consultation with the Central Government. ¹²⁵

The fact remains, however, that the Government seldom issue policy directives. ¹²⁶

(iv) Financial Control

The financial independence is considered to be the life-blood of an enterprise. The term 'autonomy' will be meaningless if the governing

125. Lok Sabha Debates, 2 March, 1973, page 92.

126. Lok Sabha Debates until 1976 failed to provide another question on this subject.

board is not permitted to manage its own affairs. The Corporations especially the financial, industrial and commercial, therefore, should be free from delays caused by excessive government control, although, obviously, it does not mean that they will enjoy unrestricted freedom in this respect. In fact, the Minister exercises a great deal of control over the public corporations in this field. This is true to say that ministerial control becomes very effective when it is applied through financial strings.

(a) Capital

The capital stock of all public corporations is raised in accordance with the provisions as set out in the respective statutes.

The Food Corporation Act, 1964, lays down that the original capital of the Corporation shall be a sum not exceeding one hundred crores of rupees and if need be, the Central Government may from time to time increase the capital of the Corporation to such extent and in such manner as that Government may determine. It is provided after due appropriation made by Parliament by law for the purpose. ¹²⁷

For the Rehabilitation Finance Administration, the financial provision is that the Central Government may from time to time, advance money to it not exceeding Rs. 14.5 crores, ¹²⁸ subject to the payment of an interest

127. S.5(1) to 5(3), F.C.I. Act, 1964.

128. S.11, R.F.A. Act, 1948.

by the administration at 3 per cent. The earnings of the Corporation consist of the interest it realises on loans made to displaced persons, (these are the people who have migrated from East and West Pakistan when India was partitioned in 1947), at a rate not exceeding 6 per cent. The profits and gains of the Administration are free from the income, super, and business profits-tax.¹²⁹

The Damodar Valley Corporation has its own fund, all receipts are credit to and all payments are made from it.¹³⁰ The three responsible Governments, the Governments of India, Bihar and West Bengal, are to provide the entire capital needed by the Corporation for the completion of the projects undertaken by it, in proportions specified for the various kinds of projects in the Act.¹³¹ Each Government should pay its share of capital required, on a date or dates specified by the Corporation, and should it fail to do so, the Corporation may raise a loan to make up the deficit at the cost of the Government concerned.¹³²

The authorised capital of the Industrial Finance Corporation was fixed at 10 crores of rupees¹³³ divided into 20 thousand fully paid-up

129. S.20, R.F.A. Act, 1948.

130. SS.29 & 30, D.V.A. Act, 1948.

131. Ibid., SS.34, 35 and 36.

132. Ibid., S.31.

133. S.4, I.F.C. Act, 1948.

shares of Rs.5000 each. Of these 10,000 shares were issued in the first instance, out of which 2,500 were subscribed by the Central Government, and 2,500 by the Reserve Bank. Insurance companies and other financial institutions could subscribe 2,500 shares in all, and the co-operative banks 1,000 shares. The repayment of shares is guaranteed by the Central Government.¹³⁴

The authorised capital of the State Bank was fixed at Rs.20 crores divided into 20,00,000 fully paid-up shares of Rs.100 each.¹³⁵ The issued capital of the Bank was maintained at Rs. 5,62,50,000 divided into 5,62,500 shares of Rs.100 each allotted to the Reserve Bank in lieu of the shares of the Imperial Bank of India transferred to it. The Central Board may from time to time increase the issued capital, but no increase in the issued capital shall be made in such a manner that the Reserve Bank holds at any time less than 55 per cent of the issued capital. The issued capital cannot be increased beyond twelve crores and fifty lakhs of rupees without the previous approval of the Central Government.¹³⁶ The holding of shares by individuals is permitted under the Industrial Finance Act and the State Bank Act. The State Bank Act

134. S.36, I.F.C. Act, 1948.

135. S.4, S.B.I. Act, 1955.

136. *Ibid.*, S.5(2) and (3).

provides that no person shall be registered as a shareholder in respect of any shares held by him, whether in his own name or jointly with any other person, in excess of 200 shares, but this restriction does not apply to the Reserve Bank, a Corporation, an insured as defined by the Insurance Act, 1938, a local authority, a co-operative society and a trustee of a public or private religious or charitable trust.¹³⁷ Similar restrictions on the individual holding of shares exist in the Industrial Finance Corporation Act, 1948.¹³⁸ There is no provision regarding guaranteeing the shares of the Bank found in the Act creating the Corporation.

In the case of the two Air Corporations, the initial expenditure incurred was provided by the Central Government, which may also provide any further capital that may be required by either of the Corporations for the carrying on of the business of the Corporation or for any purpose connected therewith, on such terms and conditions as the Central Government may determine.¹³⁹ An identical provision is found in the Oil and Natural Gas Commission Act, 1959.¹⁴⁰ (no amount was mentioned).

The Life Insurance Act, 1956, provides that the original capital

137. *Ibid.*, S.11(1).

138. S.4(3), I.F.C. Act, 1948.

139. S.10(1) & (2), Air Corps. Act, 1953.

140. S.16(1) & (2), O & N.G.C. Act, 1959.

of the Corporation shall be five crores of rupees provided by the Central Government after due appropriation made by Parliament by law for the purpose and the Central Government is authorised, on the recommendation of the Corporation, to reduce the capital of the Corporation to such extent and in such manner as the Central Government may determine.¹⁴¹

The fund of the Employees' State Insurance Corporation consists of contributions made by the employers and employees at prescribed rates and all other monies received on behalf of the Corporation.¹⁴² Loan-capital¹⁴³ was also provided by the Central Government, but which was adjustable against the annual grants¹⁴⁴ which the Central Government was under an obligation to make to the Corporation for the first five years after the establishment of the Corporation.

The Corporation is authorised to accept grants, donations and gifts from the Central and State Governments, local authorities and individuals or bodies or all or any of the purposes of the Act.¹⁴⁵

141. S.5(1) & (2), L.I.C. Act, 1956.

142. S.26(1), E.S.I. Act, 1948.

143. S.31, *ibid.*

144. S.31, *ibid.*

145. S.26(2), *ibid.*

In some cases, a Corporation has to submit to the Central Government its programme and budget for the next year. Thus, the Food Corporation Act, 1964, provides that "the Food Corporation shall, before the commencement of each year, prepare a statement of programme of its activities during the forthcoming year as well as a financial estimate in respect thereof, at least three months before the commencement of each year."¹⁴⁶

A similar provision exists in the Oil and Natural Gas Commission Act, 1959.¹⁴⁷

(b) Borrowing

The Minister's approval is also required in the matter of borrowing by Corporations. They are authorised to borrow money with the previous sanction or consent of the Central Government, or in accordance with the terms of any general authority given to them by the Central Government.¹⁴⁸ They are also permitted to finance themselves by issuing and selling of bonds and debentures which are guaranteed by the Central Government as to the repayment of principal and the payment of interest thereon.¹⁴⁹ Besides controlling the rate of the dividend which is declared by the Corporations out of their

146. S.26.

147. S.21.

148. S.42, D.V.C. Act, 1948; S.10(3), Air Corps. Act, 1953.

149. S.21(2), I.F.C. Act, 1948; S.10, Air Corps. Act, 1953.

net profits, Government may also share in whole or in part, the profits made by the Corporation.¹⁵⁰

The accounts of the Corporations have to be prepared and kept in a form settled in consultation with the Central Government or the Comptroller and Auditor-General, and the accounts are normally audited and examined by auditors appointed by the Minister or by the Auditor-General himself. (This question has already been discussed in some detail in connection with the audit control.)

The Ministers are also entitled to receive all the necessary information from the Corporations which are under a statutory obligation to submit to the Ministers accounts, returns, periodic statements, annual financial estimates, programmes and the annual report on the activities and working.¹⁵¹

In 1965, the Central Government created the office of the Bureau of Public Enterprises, within the framework of the Ministry of Finance, with a view to maintaining co-ordination between the policy of the Government and its implementation through the instrumentalities of these public corporations. In their 52nd Report (III Lok Sabha, page 57, 1963-64), on Personnel Policies of Public Undertakings, the Estimates Committee felt the need for an agency in the Government of India which could gather together, classify and

150. S.32, I.F.C. Act, 1948; S.37, D.V.C. Act, 1948.

151. S.45, D.V.C. Act, 1948; S.18, R.F.A. Act, 1948; S.37, Air Corps. Act, 1953; S.35, I.F.C. Act, 1948; S.32, E.S.I. Act, 1948; S.27, L.I.C. Act, 1956; S.35, F.C.I. Act, 1964; S.23, O & N.G.C. Act, 1959.

communicate such of the recommendations of the Committee as were of general application to all public enterprises though the recommendation was contained in a report which was of immediate and direct interest only to one Ministry. The then Secretary of the Ministry of Industry, speaking as a witness on behalf of the Government, promised to get the matter examined and see if such an agency could be useful in other matters of common concern to public enterprises and if so, to set this up. And the Bureau was set up in April, 1965, to perform the following functions:-

- (1) To provide a central point of reference and consultation and to deal with matters of general interest, such as organisational patterns, methods of management, personnel policies, collaboration arrangements, training programmes, project planning, economic, financial and social policies.
- (2) To explore all avenues of economy in the capital costs of the projects.
- (3) To devise steps for improving productivity and profitability of public enterprises.
- (4) To undertake appraisal and evaluation of selected areas in the performance of public enterprises from time to time.
- (5) To prepare annual reports for presentation to Parliament, and also other reports that might be called by Committees of Parliament or other Government agencies.¹⁵²

152. Organisation, Set-up and Functions of the Ministries/Departments of the Government of India, 253, (3rd ed.), published by the Ministry of Finance.

In 1974, a back-bench M.P. wanted to know whether the Bureau of Public Enterprises had made any study of the basic problems in functioning of public undertakings and the measures proposed to be taken to meet these problems. The Minister for Finance had this to say:

The Bureau of Public Enterprises has found out that some of the basic problems of public enterprises relate to the long gestation periods, the time taken to develop skills in some sophisticated industries, shortage of raw materials, components, power and unsatisfactory industrial relations, and in some cases, inadequacy of demand.

Some of the important measures taken to improve the operations of public enterprises relate to:

- (i) Improvements in organisational structure and manning at the corporate as well as plant level;
- (ii) Improvements in technology, operating method and maintenance system;
- (iii) diversification and export to improve capacity utilization;
- (iv) provision of additional facilities to remove bottlenecks and imbalances;
- (v) improvement of the quality and availability of indigenous materials;
- (vi) Import of critical components and raw materials;
- (vii) improvement in industrial relations, communication system, personnel management, training and development;
- (viii) institution of improved incentive/ 153
reward scheme at all levels.

The Bureau, therefore, is a useful institution to bring about an all-round improvement in the public enterprises through better management, higher production and higher return on investment.

We have mentioned above the capital structures of some corporations as set out in the respective statutes, as a result of which the boards have the advantage of operating under those well-defined terms. But there are some areas whose decisional initiative may vest in the boards themselves, but which sufficiently involve broader consideration that call for governmental attention and sanction. Examples may be cited of the pricing structures, investment policy and dividend policy. It is noticeable that there has been a greater Ministerial control in these areas.

One broad provision relating to pricing is that the public enterprise shall conduct its operations on 'business principles'. The question is: are the boards free to fix prices on their own productions in accordance with market conditions? It will be seen that the importance of pricing in the public sector is being considered in relation to the general economy of the country and not in isolation in respect of a particular industry. For example, a railway's pricing structure may lead to losses under social pressures or a public-owned colliery may sustain high costs by being overmanned.

The pricing policy of certain basic products of national importance like coal, oil, steel, etc. is kept under constant observation and review.

The boards are bound to follow their pricing structure in accordance with the instruction issued by the Minister. The basis of fixing the prices of public sector products is stated by the Minister of Finance in Parliament as follows:

- (a) In framing the price of the products like coal, oil, steel, etc. usually the following factors are taken into consideration:
 - (i) Cost of production at reasonably achievable capacity.
 - (ii) The ability of consumers to bear the prices;
 - (iii) Reasonable margin to be allowed to the producers; and
 - (iv) Landed cost of imported products.
- (b) In case of a public sector unit which enjoys monopoly or near monopoly position with respect to certain products, usually landed cost of comparable imported product is taken as the ceiling price, below which a suitable price is fixed.
- (c) In case of certain products like photography films, bricks, certain medicines, electronic equipments, heavy chemicals, etc. the prices are fixed by normal market forces of demand and supply. 154

The Government from time to time prescribes guide-lines in connection with the appropriation of profits and declaration of dividends for the consideration of the Board of Directors of the public undertakings. It is the responsibility of the boards to follow the guide-lines. The Government

representatives (i.e. Secretary) in the board are required to ensure that the interests of the Government and the shareholders are kept in view by the Board of Directors at the time of considering the appropriation of profits towards internal resources and declaration of dividends.¹⁵⁵

With regard to capital expenditure and investment, the Board of Directors were delegated powers to sanction capital expenditure in cases where detailed project reports have been prepared with the estimates of different component parts and where such project reports were approved by the Government. But an increase over 20% of the level of investment based on the approximate estimates of cost initially indicated will require the approval of the Cabinet.¹⁵⁶

We could discuss and analyse to what extent these instructions are followed by the Board of Directors in practice, if the annual reports of some public undertakings were available here.

It is unfortunate that although the annual reports of the Life Insurance Corporation, 1974-75, the Air India Corporation, 1974-75, Coffee Boards, 1974-75, etc.¹⁵⁷ have^{been} laid on the table, no discussion took place on these reports.

155. A Hand Book of Information on Public Undertakings, page 159.

156. Ibid., page 157.

157. Lok Sabha Debates, 23 January, 1976, Vol. 56, pages 125-128.

Therefore, we conclude with the remark that some time should be specially earmarked every year for the discussion of the annual reports on the floor of both Houses of Parliament for better accountability of these undertakings to the public through Parliament.

4.10 Parliamentary Control

One problem common to all countries is that of ensuring that the public corporations shall be adequately accountable to Parliament. It is Parliament which creates the public corporations and therefore, it is its responsibility to ensure that they carry out the activities entrusted to them, and do not exceed their statutory powers. As Parliament is also responsible for broad financial policy of the public corporations, it is through its financial powers that it chiefly exercises control over them. It is the function of Parliament to be the watchdog of the tax-payer and it is natural that it should be more formal in its relationship and more critical in its approach.

Under a parliamentary form of government, such as the Indian, members of Parliament are, therefore, entitled to ask any question about a corporation. Parliament's authority to watch the working or to exert influence over the conduct of the corporation is undisputed in any democratic country. It is true that in Britain questions about the affairs of a public corporation must be restricted to those matters for which a Minister is made responsible by statute.¹⁵⁸ But in India, the speaker is allotted (under Rule 55) half-an-hour for raising discussion on a matter of a recent question, here

158. "Public Corporation in the U.K.", J.F. Garner in the "Public Enterprise", Friedmann (ed.)

an M.P. has a chance to ask a question on matters of policy but not on day-to-day administration.

Public corporations are accountable to Parliament through Ministers on matters for which Ministers have responsibility, but Ministers are not responsible for their day-to-day administration. This point has been explained clearly by Mr. Herbert Morrison. In his words:

It is, of course, a firm Parliamentary rule and tradition that a Minister is accountable to Parliament for anything he or his Department does or for anything he has powers to do, whether he does it or not. That is to say, if the action or possible action is within the field of ministerial power or competence the Minister is answerable to Parliament. On the other hand, in regard to all matters declared to be within the discretion of the authority, the Minister would be entitled and, indeed, bound to disclaim responsibility. 159

as
So far/ the Indian Parliament is concerned, the Minister is answerable to it, but the Indian Parliament has not prescribed any detailed principles governing parliamentary control over the public corporations. This problem has been further complicated due to the fact that the Acts creating public corporations do not contain any specific provision for Parliamentary control except in provision for laying of annual reports, estimates and accounts

159. H. Morrison: Government & Parliament, (1959), pages 256-257.

before Parliament.

The principal methods which Parliament usually applies for the exercise of direct control include questions by the Members of Parliament, debates and examination by Parliamentary Committees.

Let us first consider the statutory provisions which are laid down in the various statutes.

The Life Insurance Corporation Act, 1956, provides that the Central Government shall place the report of the auditors, the report of the actuaries and the report giving an account of the activities of the Corporation during the year before both Houses of Parliament.¹⁶⁰ The Air Corporations Act, 1953, makes further provision for the submission of the programme of the Corporation and of the activities which are likely to be undertaken by the Corporation.¹⁶¹ The reports thus laid before Parliament are open to discussion. But the State Bank Act and the Reserve Bank Act make no provision for submission of annual reports to Parliament. However, the reports of the Reserve Bank are required to be published in the Official Gazette. On the recommendation of the Estimates Committee,¹⁶² the Government

160. S.29, L.I.C. Act; S.35(2), F.C.I. Act, 1964; S.23, O & N.G.C. Act, 1959.

161. S.37(1), Air Corps. Act, 1953; S.26(1), F.C.I. Act, 1964.

162. 9th Report (III L.S.), page 5.

agreed to place the reports of the State Bank and the Reserve Bank on the table of both the Houses; but no statutory change has been made for this purposes.

(i) Questions

The best-known weapon for the purpose of ensuring public accountability of a public corporation is the parliamentary question. But since questions may not be asked on details of day-to-day administration, they have to be confined to those matters where the Minister has specified duties under the Act. Under Rule 32 of the Rules of Procedure of the Lok Sabha, unless the Speaker otherwise directs, the first hour of every sitting shall be available for the asking and answering of questions. The rules of admitting questions with regard to public corporations are as follows:-

- (i) Where a question (a) relates to a matter of policy or (b) refers to an act or omission of an act on the part of a Minister, or (c) raises a matter of public interest although it may pertain to a matter of day-to-day administration, or in an individual case, it is usually admitted for oral answer.
- (ii) A question to obtain information from the Corporation concerned is normally admitted as unstarred.
- (iii) Questions which clearly relate to day-to-day administration and tend to throw work on the Ministers and the Corporation incommensurate

with the result to be obtained therefrom are generally disallowed. 163

The Minister may often refuse to answer on the grounds that he is not responsible. He can do so either because there is no clear distinction between general policy and day-to-day administration, or because he has chosen to influence the Board's decision informally by prior consultation instead of through clear-cut directives.

A Minister is bound to answer a question which falls within the domain of his statutory responsibility - for example, a question relating to appointment, dismissal, approval or a specific direction which he is required or empowered by statute to give.

(11) Debates

Debate in Parliament will take place on bills especially bills increasing a Corporation's borrowing powers or on a bill introduced to amend the original statute or on a private member's motion relating to a matter of urgent public interest or importance or on the day set aside for discussing the Board's annual report in the House. The Government's present and future policies can be properly and correctly drawn up, if due weight is given to these debates and discussions.

163. Speaker's Directive dated 17 March, 1958, Parliamentary Bulletin, Part II, 18 November, pages 1431-2.

Under Rule 55 of the Rules of Procedure of the Lok Sabha, the Speaker (or the Chairman) is allotted half-a-hour for raising discussion on a matter of a recent question and the answer needs elucidation on a matter of fact. A private member may also move a motion for an adjournment of the business of the House for discussing a definite matter of urgent public importance.

Discussion on matters relating to public corporations may also occur through the medium of resolutions. Rule 171 of the Rules of Procedure of the Lok Sabha provides that:

a resolution may be in the form of a declaration of opinion, or a recommendation or may be in the form so as to record either approval or disapproval by the House of an act or policy of Government or convey a message, or command, urge or request an action or call attention to a matter or situation for consideration by Government, or in which such other form as the Speaker may consider appropriate.

Rules 136 and 137 of the Rajya Sabha Rules similarly provide for resolution.

Motions have proved much more useful in this field. This is only natural, for the Rules of Procedure declare that save insofar as is otherwise provided in the Constitution, or in these rules, no discussion of a matter of general public interest shall take place except on a motion made with the consent of the Speaker.

(iii) Parliamentary Committees

Until 1964, Parliament used to exercise its control over the public undertakings through the Estimates Committee and the Public Accounts Committee, which were authorised by Parliament to look into the affairs of the public undertakings. In accordance with a motion passed by Parliament in 1963, the Committee on Public Undertakings was established for the first time with effect from 1 May, 1964, to examine the working of public undertakings. To replace the first two Committees by the Committee on Public Undertakings was originally recommended by the Krishna Menon Committee on the Parliamentary supervision over State undertakings, appointed in 1959. A similar institution, known as the Select Committee on Nationalised Industries, was constituted by the British House of Commons in 1957. It was empowered to examine the reports and the accounts of the nationalised industries and to report to the House.

Though the Estimates Committee and the Public Accounts Committee made valuable contributions and recommendations relating to organisation, procedures, etc., the Krishna Menon Committee found that the existing methods of Parliamentary control over the public undertakings were not adequate so as to bear on them enough Parliamentary criticism.

The examination of the affairs of the public enterprises by the Estimates Committee used to be quite detailed and at times, it even went into the day-to-day working of these enterprises.¹⁶⁴ The Committee submitted nearly 131 reports on public enterprises. Out of these, 75 deal with particular enterprises and 51 are "action taken reports" which examine the action taken or proposed to be taken by the Government on its recommendations.¹⁶⁵

The Committee on Public Undertakings carries the functions of both the Estimates Committee and the Public Accounts Committee with regard to public undertakings. The members are 15 in number — 10 from the Lok Sabha and 5 from the Rajya Sabha; a Minister cannot be a member of the Committee. The members are elected every year by each House on the principle of proportional representation by means of a single transferable vote.

The functions of the Committee shall be:-

- (a) to examine the reports and the Accounts of the public undertakings;
- (b) to examine the reports, if any, of the Comptroller and Auditor-General on the public undertakings;
- (c) to examine, in the context of the autonomy and efficiency of the public undertakings, whether the affairs of the public undertakings

164. J.P. Sharma: Estimates Committee on Public Enterprises, II I.J.P.A. (1965), pages 113-114.

165. J.P. Sharma: ibid., page 83.

are being managed in accordance with sound business principles and prudent commercial practices;

- (d) Such other functions vested in the Public Accounts Committee and the Estimates Committee in relation to public undertakings specified under the Rules of Procedure and conduct of business of this House as are not covered by clauses (a), (b) and (c) above, and as may be allotted to the Committee by the Speaker from time to time. Provided that the Committee shall not examine and investigate any of the following matters, namely:-

- (i) Matters of major Government policy as distinct from business or commercial functions of the Public Undertakings;
- (ii) matters of day-to-day administration;
- (iii) matters for the consideration of which machinery is established by any special statute under which a particular Public Undertaking is established.

The Committee shall be concerned with the following types of Public Undertakings : ¹⁶⁶

- (1) Public Undertakings established by Central Acts such as (a) the Damodar Valley Corporation; (b) the Industrial Finance Corporation; (c) The Life Insurance Corporation, etc.

166. These fall within the definition of Public Undertakings.

- (2) Public Undertakings which are Government Companies formed under the Companies Act, i.e. every Government Company whose annual report is placed before the Houses of Parliament under sub-section (1) of Section 619 of the Companies Act, 1956.
- (3) Specific enterprises like Hindustan Aircraft Ltd., Bharat Electronics, Garden Research Workshop Ltd., etc.¹⁶⁷

The status of this Committee is advisory and its recommendations are not obligatory on the part of the Government to comply with. It has no other organ to see that the accepted recommendations are carried out by the Government. If they are not implemented, the Committee may ask the Government to supply the reasons for not doing so.

It is pleasing to note that although the status of this Committee is advisory, the Government considers seriously the recommendations it makes. The Committee recommended that the steps should be taken to bring the Food Corporation within the audit control of the Comptroller and Auditor-General as early^{as} practicable. (It is relevant to mention that no specific reason was given by the Committee for this recommendation.) The Government has accepted the recommendation and brought the Food Corporation under the audit control of the Comptroller and Auditor-General immediately.¹⁶⁸

167. Resolution on the Committee on Public Undertakings as passed by the Lok Sabha on 20 November, 1963.

168. 42nd Report of the Committee on Public Undertakings on the F.C.I. (1973-74), page 14.

In its sixty-sixth report during the 4th Lok Sabha on the Pipelines Division of the Indian Oil Corporation, the Committee commented adversely on the manner in which the firm of Betchels were given the contract of designing engines and supervision for construction of Gauhati-Shillong and Haldia-Barouni-Kanpur pipelines and the part played by them in the entire deal. It was due to this report of the Committee on Public Undertakings that a fully-fledged enquiry into the whole affair was carried out by Justice Takru, a retired judge, who agreed with the findings and report of the Parliamentary Committee, as submitted in his report, in 1976.¹⁶⁹

The Committee, therefore, has a great value in improving the performance and the profitability of these enterprises.

169. B.P. Mathur: Public Enterprise in Perspective, (1977), page 216.

4.11 Legal Status of Corporations

In the United Kingdom, the Corporation is regarded as a legal entity, distinct from its members and subject to legal duties and entitled to legal rights. It has legal personality and is described as an artificial person.¹⁷⁰ It is created by an Act of Parliament and can perform such functions as it is empowered to do under the Act creating it.

All statutes creating public corporations usually mention these following features, namely, it is a body corporate with common seal; it is entirely different from its shareholders; its assets are separate and distinct from those of its members; it can sue and be sued for its own purpose and it can own and dispose of property.

Professor Friedmann has advanced three reasons in order to establish that a public corporation is a legal entity distinct and separate from the State. His reasons are that there is a specific legislative purpose behind them, that they are specifically incorporated and that they are based on the principle of equality before law in the mixed economy of public and private enterprise.¹⁷¹ His contention may be supported on the ground that

170. L.C. Gower: The Principles of Modern Company Law, page 68.

171. W. Friedmann: Law & Contemporary Problems (1951), pages 586-588.

although the private and public corporations differ in their intentions behind their activities - private corporations serve private interests whereas public corporations serve public interest, but in the eye of law, both enjoy the same legal status.

In India, all statutes provide that "each corporation shall be a body corporate". Therefore, the rights, duties and obligations are entrusted to the Corporation in similar way as they are to natural persons.^{172.}

The best statement on the legal status of a public corporation is found in the observations of Denning, L.J. (as he then was), in Tamlin v. Hannaford,¹⁷³ with reference to the British Transport Commission set up under the Transport Act, 1947. He observed:

The Transport Act, 1947, brings into being British Transport Commission, which is a statutory corporation of a kind comparatively new to English law. It has many of the qualities which belong to corporations of other kinds to which we have been accustomed. It has for instance, defined powers which it cannot exceed; and it is directed by a group of men whose duty it is to see that those powers are properly used. It may own property, carry on business, borrow and lend money, just as any other corporations may do, so long

172. S.3(2) of the D.V.C. Act, S.B.I. Act, R.B.I. Act, E.S.I. Act, I.F.C Act, F.C.I. Act.

173. [1950] 1 KB.18 C.A. at pages 23-24.

as it keeps within the bounds which Parliament has set. But the significant difference in this corporation is that there are no shareholders to subscribe the capital to have any voice in its affairs. . The money which the Corporation needs is not raised by the issue of shares but by borrowing; and its borrowing is not secured by debentures but is guaranteed by the Treasury. If it cannot repay, the loss falls on the Consolidated Fund . . . , that is to say on the tax-payer. There are no shareholders to elect the directors or to fix their remuneration. If it should make losses and be unable to pay its debts, its property is liable to execution, but it is not liable to be wound up at the suit of any creditors. The tax-payer would no doubt, be expected to come to its rescue before the creditors stepped in. Indeed, the tax-payer is the universal guarantor of the Corporation. But for him it could not have acquired its business at all, nor could it now continue it for a single day. It is his guarantee that has rendered shares, debentures, and such like all unnecessary. He is clearly entitled to have his interest protected against extravagances or mismanagement.

But there are other persons who have also a vital interest in its affairs. All those whose use the services which it provides - and who does not? - and all whose supplies depend on it, in short, everyone in the land, is concerned in seeing that it is properly run. The protection of the interests of all these tax-payers, user and beneficiary - is entrusted by Parliament to the Minister of Transport. He is given powers over this Corporation which are as great as those possessed by a man who holds all the shares in a private company. Subject, however, as such a man is not, to a duty to account to Parliament for

his stewardship. It is the Minister who appoints the directors - the members of the Commission - and fixes their remuneration. They must give him any information he wants; and lest they should not prove amenable to his suggestions as to the policy they should adopt, he is given power to give them directions of a general nature, in matters which appear to him to affect the national interest, as to which he is the sole judge, and they are then bound to obey. These are great powers but still we cannot regard the Corporation as being his agent, any more than a Company is the agent of the shareholders, or even of a sole shareholder. In the eye of law, the Corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not Civil Servants, and its property is not Crown property. It is as much bound by Acts of Parliament as any other subject of the King. It is, of course, a public authority, and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of government.

This decision has settled, beyond doubt, that the commercial corporations will not participate in any remaining Crown privileges. It has also settled that although the controls exercised by a Minister are enormous, for example, appointment, direction, removal, etc., even these controls are not adequate enough to qualify these Corporations as Crown servants or agents. It has also decided that if a corporation is a public authority and its purposes are public purposes, it is not entitled to claim Crown exemption.

But there are public authorities and their purposes are public purposes and can claim certain privileges.¹⁷⁴ For example, hospital boards set up under the National Health Service Act, 1946. We respectfully submit that this decision does not solve this anomaly. We feel that if we have to solve this problem (i.e. whether a corporation can be regarded as a Crown servant/agent), we have to rely on the creating statute and the nature of corporation Parliament intended to create and not on its purpose.

Professor W. Robson is undoubtedly correct in stating that one of the good features of the legislation creating public corporations is that a public corporation is liable under the ordinary law of the land in almost the same way as a commercial company or a private person, except insofar as special immunity is conferred upon it by the legislation which creates it.¹⁷⁵ The Corporation is also subject to income-tax and other revenue legislation¹⁷⁶ to the same extent as other subjects, only the Crown, Central Government departments, and corporations acting solely as agents of the Crown or a Central department (e.g. the hospital boards) are exempt.

The observations made by Lord Justice Denning (as^{he} then was) are

174. See G.F. Garner: "Public Corporations in the U.K." in the Government Enterprise, Friedmann (ed.), (1970), page 5.

175. W. Robson: Nationalised Industry and Public Ownership, page 70.

176. B.B.C. v. Johns [1965] Ch.32.

In substance true with respect to the public corporations in Indian law, except in one respect which is that some of the public corporations are authorised to raise capital by issuing shares, though the shareholders are Governments and financial institutions such as banks, investment trust, insurance companies and co-operative societies. Every Act creating a public corporation opens with the provisions that "the said Corporation shall be a body corporate, having a perpetual succession and a common seal, and shall by the said name sue and be sued." Therefore, a public corporation must be capable of suing and being sued. It can conclude contracts, hold and dispose of property, is liable to pay taxes like ordinary companies, etc. In fact, it possesses all the ingredients of a natural person and, therefore, has legal personality. It is true that some public corporations have shareholders, but for that matter, they do neither enjoy nor suffer any disadvantages. Like other corporations, they equally enjoy separate legal status and are liable for their own acts. All are equal before the law.

All the public corporations in India have been created by statute except the fourteen statutory corporations established to take over the affairs of the fourteen commercial banks, which are created by a Government Ordinance.¹⁷⁷ This was the first time the Government had taken the

177. Under Article 123 of the Constitution of India, power vests in the President of India to create a public corporation by an Ordinance.

advantage of Article 123. In July 1969, the Vice-President acting as the President of India, promulgated the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, vesting the undertakings of fourteen banks in corresponding new banks set up under the Ordinance. Petitions challenging the competence of the President to promulgate the Ordinance were immediately lodged in the Supreme Court. But in August 1969, before these petitions could be heard, Banking Companies (Acquisition and Transfer of Undertakings) Act was passed. The Act was then challenged and the Supreme Court by a majority judgment declared that this Act of 1969 was void. The Court struck down the Act on the ground that it violated Articles 14, 19 and 31(2) of the Constitution, which guaranteed equality before and certain Ft. right. *reacted to this judgment and* The Government quickly promulgated a fresh Ordinance on 14 February, 1970, re-nationalising the banks. Subsequently, the Ordinance was replaced by the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, which received the President's assent on 31 March, 1970.

Section 3(2) of each of the Damodar Valley Corporation Act, 1948, the Life Insurance Corporation Act, 1956, the State Bank Act, 1955, the Industrial Finance Corporation Act, 1948, the Reserve Bank Act, 1934, the Food Corporation Act, 1964, to name a few, declares that each of the Corporations shall be a body corporate having perpetual succession and a

common seal with power, subject to the provisions of (this) Act, to acquire, hold and dispose of property, and may by its name sue and be sued."

It is strictly from the legal point of view that all the Corporations may be said to be Corporations aggregate ¹⁷⁸ *Each Corporation can sue or be sued in its own name.*

Section 3 of the Reserve Bank Act, 1934, lays down that:

- (1) a Bank to be called the Reserve Bank of India shall be constituted for the purposes of taking over the management of the currency from the Central Government and of carrying on the business of banking in accordance with the provisions of this Act.
- (2) The Bank shall be a body corporate by the name of the Reserve Bank of India, having perpetual succession and a common seal, and shall by the said name sue and be sued.

The public corporation is treated in the same way as a company for taxation purposes. Statutes creating corporations which are likely to make profits contain specific provisions for payment of taxes on income, and for this purpose the corporation shall be deemed to be a company within the meaning of the Income-Tax Act, 1961.¹⁷⁹ Only the Rehabilitation Finance

178. Corporation sole: An artificial legal person consisting of only one individual. Corporation aggregate: Corporations which do not consist of one person only.

179. S.40, I.F.C. Act, 1948; S.43(1), D.V.C. Act, 1948; S.42, F.C.I. Act, 1964; S.29, O & N.G.C. Act, 1959.

Administration and the Reserve Bank are exempted from the payment of taxes on income.¹⁸⁰

Several statutes contain a provision relating to winding-up similar to the one stated below:

No provision of law relating to the winding-up of companies or corporations shall apply to the corporation established under (this) Act, and the corporation shall not be placed in liquidation save by order of the Central Government and in such manner as that Government may direct. ¹⁸¹

It is an interesting point to note that though the corporation is regarded as a company for taxation matters but for winding-up purposes, the same law will not apply to the corporation.

Sometimes a statute creating a public corporation contains a provision to the effect that the specific powers given to it by the Act shall not be construed as permitting it to disobey any law for the time being in force.¹⁸²

Some corporations have been empowered to modify certain agreements entered into within a short period of the date when the business has

180. S.20, R.F.A. Act, 1948; S.48(1), B.B.I. Act, 1934.

181. S.37, T.F.C. Act, 1948; S.38, L.I.C. Act, 1956; S.45, S.B.I. Act, 1955; S.57, R.B.I. Act, 1934; S.43, F.C.I. Act, 1964.

182. S.7(3), Air Corps. Act., 1953.

been transferred and vested in the corporation, if they impose unreasonable liabilities on the corporation and seek relief in the case of those transactions which have resulted in dissipation of assets.¹⁸³

The Industrial Finance Corporation and the Rehabilitation Finance Administration have been granted certain privileges which are not available to a person under the law. They can demand repayment of a debt before the due date by an application before the District Judge. The remedy available is transfer of the management to the corporation, injunction restraining the industrial concern from removing a machinery and the equipment and sale of the property pledged or mortgaged.¹⁸⁴

The creditors of a public corporation cannot obtain satisfaction from the assets of its members, and the creditors or the members have no right to the assets of the corporation.¹⁸⁵

183. SS.14 and 15, L.I.C. Act, 1956; SS.23 and 24, Air Corps. Act, 1953.

184. SS.29 and 30, I.F.C. Act, 1948; SS.14 and 15, R.F.A. Act, 1948.

185. Tata Engineering & Locomotive Co. v. State of Bihar, A.I.R. 1965 S.C. 40 at 46.

4.12 Judicial Control

As corporate bodies, all public corporations are subject to the ultra-vires doctrine.¹⁸⁶ Therefore, the Courts can ensure that the corporation restricts its activities which it is authorised to exercise under the Act creating it. The Courts have legal power to intervene if it exceeds its power.

In the United Kingdom:

Commercial public corporations are treated both as public authorities and as commercial concerns. As public authorities, they are subject to the normal controls of constitutional and administrative law; to supervision by the Minister, who in turn, is answerable to Parliament, and by the Courts through the control which they exercise over administrative authorities.¹⁸⁷

It has been pointed out by Professor J. Garner that the statutory powers conferred on the public corporations are frequently so widely drawn as to make the ultra vires doctrine nugatory as a means of exercising judicial control

186. Ultra vires: This is a Latin expression meaning, "Beyond the lawful power". An act of a company or a corporation is to be ultra vires when it is "beyond the powers" of the person who has done it. If he does, the Courts can declare it ultra-vires or void.

187. L. Gower: The Principles of Modern Company Law, page 238.

over the activities of the corporation,¹⁸⁸ for example, the Atomic Energy Authority is empowered to produce, use and dispose of atomic energy, and "to do such things as may seem to them necessary and expedient for the exercise of the foregoing powers".¹⁸⁹ This clause is so broad and wide that it could be interpreted by the Corporation in such a manner that it will be difficult, if not impossible, for the Courts to apply the doctrine of Ultra-vires.

It has been decided in many cases in India that a public corporation is a distinct and separate legal entity from the State. It is subject to the doctrine of Ultra-vires and the ordinary laws¹⁹⁰ of the land, except where it is expressly laid down by the creating statute that the corporation should enjoy certain special privileges and immunities. The Corporation's separate existence and non-departmental character are recognised both by statute and in practice.¹⁹¹

The Supreme Court held in Bartum Chemicals Ltd. v. Company

188. J. Garner: Government Enterprise, Friedmann (ed.) page 12.

189. S.2(1), Atomic Energy Act, 1946; S.7(2), The Post Office Act, S.(1)(2), Coal N. Act,

190. Hindusthan Antibiotics Ltd. v. The Workmen, A.I.R. (1967), S.C.948.

191. Subodh Ranjan v. Sindri Fertilizers and Chemicals Ltd., A.I.R. 1957 Patna 10.

Law Board¹⁹² that a corporate body is an artificial legal person. The same view had been expressed in Tata Engineering & Locomotive Co. v. State of Bihar.¹⁹³

In Andhra Pradesh State Road Transport Corporation v. I.T.O.,¹⁹⁴ the Corporation claimed exemption from Union taxation on its income under Article 289(1) of the Constitution, which exempts the income of a State from centrally-levied income tax. It was held by the Supreme Court that the income of the A.P. Road Transport Corporation set up under the Road Transport Corporation Act, 1950, is not the income of the State of Andhra Pradesh within the meaning of Article 289(1), because the Corporation has a separate legal entity of its own, distinct from the State, and is not exempt from Union taxation.

The judicial intervention is needed to limit the activities of a corporation within the bounds as provided by the Act creating it and also find out any legal remedies which are available to a person against the public corporation in case there is a violation of powers on the part of the Corporation.

192. A.I.R. 1967 S.C.295.

193. A.I.R. 1965 S.C.40.

194. A.I.R. 1964 S.C. 1486.

(1) Liability in Tort and Contracts

As mentioned earlier, a corporation is distinct and separate from the State and it can sue and be sued in its own name. Therefore, it cannot claim any protection under Article 299 of the Constitution (i.e. the text of this Article has been mentioned in Chapter II).

Some statutes creating public corporations contain specific provisions to the effect that the corporations can make contracts and can sue and be sued for breach of contract.¹⁹⁵ And where a corporation has done all that it was bound to ^{do} under a single contract, it may in like manner sue the other party for non-performance on his part.¹⁹⁶

Since the Acts say that the corporation can sue and be sued, it may be taken that the public corporation will be liable for the torts of its servants to the same extent as a private employer of full age and capacity would have been.¹⁹⁷ However unjustified, a large number of statutes creating public corporations contain a specific provision which exempt them and their employees from liability. A typical provision like the one below

195. S.9(1), L.I.C. Act, 1956; S.7(1)(h), Air Corps. Act, 1953.

196. Awon: Principles of the English Law of Contract, page 50.

197. R.S. Arora: "State Liability and Public Corporation in India", Public Law, (1966), page 246.

limits the liability of the corporation for the torts of its servants: " No suit or other legal proceeding shall lie against the Corporation for any loss or damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act." ¹⁹⁸

Under common law, servants of the public corporation would normally be liable for their torts personally. But some Indian statutes confer immunity on the servants of the corporation. For example: Section 47 of the Life Insurance Corporation Act, 1956, provides: "No suit, prosecution or other legal proceeding shall lie against any member or employee of the Corporation for anything which is in good faith done or intended to be done under this Act." ¹⁹⁹ In the Damodar Valley Corporation Act, 1948, employees of the Corporation are protected from "suit, prosecution or legal proceeding" but the Corporation is protected against only civil liability for damage. ²⁰⁰ As the Corporation is a distinct person in law, it cannot claim protection under Article 300 of the Constitution with regard to suits for torts committed by its servants.

198. S.40, F.C.I. Act, 1964; S.47, S.B.I. Act, 1955.

199. S.28, O. & N.G.C. Act, 1959.

200. S.57, D.V.C. Act, 1948.

(11) Mandamus:

It is now well-established that the writ of mandamus²⁰¹ will lie against a public corporation. In Prag Tools Corporation v. Immanuel,²⁰² the Supreme Court held that mandamus may be issued even to a company if it has been placed under a statutory duty. It is not necessary that the person or the authority on whom the statutory duty is imposed need to be a public official or an official body. A mandamus can be issued, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings.²⁰³

We have mentioned earlier that a Minister has power to issue directions to a corporation. The question is now: can mandamus be issued to enforce them? Professor S.A. de Smith, a leading authority on the subject, has suggested that if a board were to refuse to comply, the Minister could presumably compel performance of the duty by obtaining an order of mandamus, or alternatively be awarded a judicial declaration that the board

201. The writ of mandamus is a writ directed by a Judge of the High Court to any inferior Court or to any individual, person or other body, order such person to perform any public duty he may be liable to perform.

202. A.I.R. 1969 S.C. 1306.

203. *Ibid.*, 1309-10.

was in breach of duty; but matters have yet to be brought to this pass, and in such a situation a Minister might prefer to exercise his powers of dismissal.²⁰⁴

(iii) Availability of Fundamental Rights

Now the question remains whether (a) fundamental rights can be claimed by the public corporations and (b) whether a person can claim fundamental rights against the public corporations. In the case of State Trading Corporation of India v. Commercial Tax Officer,²⁰⁵ the Supreme Court held that a public corporation is not a citizen within the meaning of the Citizenship Act and hence cannot claim any of the fundamental rights guaranteed under Article 19 of the Constitution. As regards the question of enforcement of fundamental rights against the public corporations, it has been judicially interpreted that the expression "other authorities"ⁱⁿ Article 12 of the Constitution includes public corporations. The Supreme Court in Rajasthan State Electricity Board v. Mohan Lal,²⁰⁶ held that a statutory body or the board comes within the category of "other authorities" under Article 12, and the fundamental rights can, therefore, be enforced against it by a person affected. The Court does not look into the question whether the body concerned is carrying on commercial activities or not.

204. S.A. de Smith: Constitutional & Administrative Law, (1971), page 225.

205. A.I.R. 1963 S.C. 1811.

206. A.I.R. 1967 S.C. 1857.

CHAPTER 5

PUBLIC ENTERPRISE IN TANZANIA

(for Statutory and Public Corporations)

- 5.1 Introduction
- 5.2 Government Department
- 5.3 Parastatal Organisation - Definition and Scope
- 5.4 Distinction between Statutory Corporation, Public Corporation and Government Companies
- 5.5 Boards of Management - Appointment and Dismissal
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5.1 Introduction

Tanzania's determination to stamp out capitalism and to establish socialism has brought the pressure to bear upon the Government to take nationalisation measures and control over the means of production and exchange. Nyerere has spelt out in clear terms why he is against capitalism in Tanzania:

But the decisions (under Capitalism) as to what goods shall be produced, and how they shall be produced, are made by a small number of people who have control over land and capital. And the determining factor in all their decision-making is whether the activity will yield a monetary profit, or power, or prestige, to them as owners of the land and capital. The needs of mankind are secondary, if they are considered at all. The result is a few men living in great luxury. At the same time masses of men, women and children are reduced to beggary, squalor, and to the humiliation of that disease and soul-destroying insecurity which arises out of their enforced poverty. 1

Hence, there was creeping nationalisation by purchase of shares in Tanzania before the Arusha Declaration in 1967. The Government's intention of controlling the means of production and exchange can be seen

1. J.K. Nyerere: "Speech to the Mary Knoll Congress in New York", (Dar es Salaam, Government Printer, 1970), page 13.

in the establishment of the National Development Corporation in 1964.

Before the Arusha Meeting

there are 21 existing firms of various kinds which are already fully Government owned and run under the supervision of the NDC, and 17 in which NDC hold 50 per cent of the shares or more. In addition, industries, for example, Lands, Forests, Mineral Resources, Water, Electricity, Posts, Telecommunications, Radio, Railways, and so on, are in Government hands or Government control. 2

One of the basic principles of the Interim Constitution of Tanzania, 1965 (which is set out in Article II, para.4 of the TANU Constitution) is that "in order to ensure economic justice the State must have effective control over the principal means of production".³ The Constitution also believes

that it is the responsibility of the State to intervene actively in the economic life of the nation so as to ensure the well-being of all citizens, and so as to prevent the exploitation of one person by another or one group by another, and so as to prevent the accumulation of wealth to an extent which is inconsistent with the existence of a classless society. 4

2. J.K. Nyerere: "Public Ownership in Tanzania" in Freedom & Socialism, page 254.

3. *Ibid.*, para. (h), page 232.

4. *Ibid.*, para (i).

In view of the above (and the Socialist ideology of men and the Party referred to in Chapter I), the Arusha Declaration of February, 1967, was not a bolt from the blue. The Declaration was a commitment to a policy of nationalisation in order to control the principal means of production and exchange. It contains, *inter alia*, a statement on public ownership, which runs as follows:

To build and maintain Socialism it is essential that all the major means of production and exchange in the nation are controlled and owned by the peasants through the machinery of their Government and their co-operatives. Further, it is essential that the ruling party should be a party of peasants and workers. The major means of production and exchange are such things as: land; forests; minerals; water; oil and electricity; news media; communications; banks; insurance; import and export trade; wholesale trade; iron and steel, machine-tool, arms, motor car, cement, fertilizer, and textile industries; and any big factory on which a large section of the people depend for their living, or which provides essential components of other industries; large plantations, and especially those which produce raw materials essential to important industries. 5

President Nyerere has stressed that "the nationalisation and the taking of a controlling interest in many firms were a necessary part of our deter-

5. J.K. Nyerere: "The Arusha Declaration", Freedom & Socialism, pages 233-234.

mination to organise our society in such a way that our efforts benefit all our people and that there is no exploitation of one man by other." ⁶ He further added that:

We are Socialists as well as nationalists. We are committed to the creation of a classless society in which every able-bodied person is contributing to the economy through work, and we believe this can only be obtained when the major means of production are publicly owned and controlled. But the fact remains that our recent socialist measures were not taken out of a blind adherence to dogma. They are intended to serve our society. ⁷

Furthermore,

We decided to secure majority ownership in industries because they are key points in our economy, and because we believe that they should therefore be under the control of Tanzania. Our purpose was thus primarily a nationalist purpose; it was an extension of the political control which ⁸ the Tanzanian people secured in 1961.

It ensures that the people of the country are able to decide development policies as well as obtain a large portion of the profits. ⁹

6. J.K. Nyerere: "Socialism is not Racism", Freedom & Socialism, page 257.

7. *Ibid.*, page 265.

8. *Ibid.*, page 262.

9. *Ibid.*, page 311.

But it cannot be denied, however, that the motives for nationalisation extend beyond the economic and into the central theme of socialist philosophy that the means of production should be owned by the people. Socialists believe that public ownership enables the people to exercise full control over the means whereby they earn their living and provides an effective means of redistributing income from property owners to the workers. It is true to say that effective Socialist planning presupposes public control over the resources of the country and thus implies public ownership. With regard to the nationalisation measures in Tanzania, Lionel Cliffe has this to say: "The motives for the nationalisations are found in the orthodox Socialist case, expressed in the Tanzanian context by the Arusha Declaration".¹⁰

Another motive for nationalisation measures was the lack of indigenous private capital and foreign investment. Nyerere admitted that it was a mistake to rely on foreign investment for development for two reasons: "Firstly, there was not enough money available; secondly, even if there were enough, Tanzania would be sacrificing its independence."¹¹ He believes that:

10. L. Cliffe: "Arusha Declaration: Challenge to Tanzanians", in the East Africa Journal, March, 1967.

11. J.K. Nyerere: Ujaama: Essays on Socialism, pages 22-25.

the policy of inviting a chain of Capitalists to come and establish industries in our country might succeed in giving us all the industries we need, but it would also succeed in preventing the establishment of Socialism unless we believe that without first building Capitalism we cannot build Socialism. 12

In respect of foreign aid, Nyerere says that:

even if all the prosperous nations were willing to help the needy countries, the assistance would still not suffice. But in any case, the prosperous nations have not accepted a responsibility to fight world poverty. If Tanzania could receive ample foreign aid, the foreign domination accompanying the aid would more than offset the economic advantages. 13

Therefore, "the only people we can rely upon are ourselves".¹⁴

Another motive for nationalisation was advanced by Shivji; he claimed that the public enterprise has been used in Tanzania to break the economic strength of the Asian and foreign groups.¹⁵ Nyerere appears to mean the same thing in his statement:

12. J.K. Nyerere: Ujaama: Essays on Socialism, page 26.

13. *Ibid.*, pages 23-25.

14. J.K. Nyerere: Freedom & Socialism, page 167.

15. Quoted from Ghat's "Control & Management of the Economy: Research Perspective on Public Enterprise" in the VRU, February, 1976, page 165. (This article gives a good account of the role of public enterprise in the management of the economy, and discusses the question of its efficiency and control over it).

Tanzania wants to control its own economy. It does not necessarily exclude foreign participation in economic life, but it does insist as soon as it can that the major means of production, distribution and exchange are in the hands of its own nationals. It would be absurd to expect Africa to accept that the well-being of its people should be indefinitely controlled from outside. Whatever economic system the peoples of different African countries eventually adopt, it is quite certain that sooner or later they will demand that the key positions of their economy are in the hands of their own citizens. 16

Although public enterprise has been chosen as an instrument to achieve the Socialist goals, Nyerere did not rule out the potential of private enterprise to help build the national economy. He said that: "We have rejected the domination of private enterprise; but we shall continue to welcome private investment in all those areas not reserved for Government in the Arusha Declaration".¹⁷ One can conclude, therefore, that Tanzania has accepted the philosophy of a mixed economy in which public and private can co-exist. In reality, there is hardly any important field left where the Government's presence is not felt.

In order to implement the obligations of the Arusha Declaration,

16. J.K. Nyerere: "Economic Nationalism" in Freedom & Socialism, pages 261-263.

17. J.K. Nyerere: "Public Enterprise in Tanzania" in Freedom & Socialism, page 254.

the Tanzanian Government has adopted four different methods to bring certain industries under public ownership and control. Firstly, by statutory corporations set up by an act of Parliament to take over entirely existing business or (later) by orders under the Public Corporation Act, 1969, (No.17). Secondly, by acquiring company shares by agreements and vesting in a public agency, e.g. the State Trading Corporation, Act No. 2 of 1967. Thirdly, by acquisition of 60 per cent shareholdings, e.g. the Tanzanian Sisal Corporation, Act. No.39 of 1967, and finally, by compulsorily acquiring and vesting all shares in an agency on a monopoly basis, e.g. the National Insurance Corporation, Act No. 4 of 1967.¹⁸ After the Arusha Declaration of February 1967, altogether five¹⁹ acts implementing extensive nationalisations (consisting of only 91 sections) were passed by Parliament within a period of two days and with little debate. Consequently, further provisions became essential for the proper functioning

18. For a full discussion see A.W. Bradley: "Legal Aspects of Nationalisations in Tanzania", in EALJ, 1967, page 149, and J.S. Read: "Tanzania" in the Annual Survey of African Law, 1967, page 169.

19. The five Acts are: (i) National Bank of Commerce (Establishment and Vesting of Assets and Liabilities) Act, 1967, Act. No.1; (ii) State Trading Corporation (Establishment and Vesting of Interests) Act, 1967, Act. No.2; (iii) National Agricultural Products Board (Vesting of Interests) Act, 1967, Act. No.3; (iv) National Insurance Corporation (Vesting of Interests and Regulations) Act, 1967, Act No.4; (v) Industrial Shares (Acquisition) Act, 1967, Act. No.5. In 1974, the State Trading Corporation was dissolved and 25 companies were formed to carry out the operations.

of these Acts.²⁰

In Tanzania, State participation in public utilities, commerce and industry is conducted through the following public institutions, namely, (i) Government Departments; (ii) Parastatals Organisations which include Statutory Corporations established by or under any written law or by an Act of Parliament, Public Corporations established by orders under the Public Corporations Act, 1969, and Companies incorporated and registered under the Companies Ordinance, 1931 (Cap.212), where the Government holds at least fifty per cent of the total issued shares.

We will now discuss the powers and functions of each institution in turn, as well as the control exercised by Ministers and Parliament over these institutions.

20. Act No.21 of 1967; Act No.14 of 1967; Act No.4 of 1967.

5.2 Government Department

Departmental enterprises are directly subordinate to a Ministry. They are run by Civil Servants working under the direction of the relevant Minister who is fully answerable in Parliament for their performance. They have no separate legal existence. In Tanzania, a government department can only be sued through the Attorney-General (Cap.69). The characteristics of the departmental enterprises may briefly be recapitulated as follows:

- (i) They are financed by annual appropriations from the Treasury and all, or a major share, of their revenues are paid in to the Treasury.
- (ii) They are subject to Budget, accounting and audit controls applicable to government activities.
- (iii) Their permanent staff consists of civil servants.
- (iv) They can be sued only by the prescribed procedure for suits against government.

The assumption in the case of the departmentally organised enterprises is that full governmental control over their activities exists and that there is full parliamentary control over them and Parliament may ask questions on any matter, major or minor.

5.3 Parastatal Organisation – Definition and Scope

As mentioned earlier, a Parastatal organisation may be one within the following categories of public enterprise:

- (a) a Statutory Corporation established by or under any written law;
- (b) a Public Corporation established by an order under the Public Corporations Act, 1969; and
- (c) a Company incorporated and registered under the Companies Ordinance (Cap. 212), where at least fifty per cent of the issued share capital is held by the Government.

This definition obviously does not include an enterprise where less than fifty per cent of the issued capital is owned by the Government and where the Government exercises effective influence in the management. But the Government's official definition (GN 1976 of 1967) includes all the above three categories as well as an enterprise where the Government has minor share holdings. The General Notice No. 1976 of 1967 defines it thus:

A Parastatal organisation is not an integral part of Government but an institution, organisation or agency which is wholly or mainly financed or owned and controlled by the Government. The criterion of such public enterprises would be ownership by Government of fifty per cent or more of the capital shares or other forms of Government participation and effective influence in all the main aspects of the management of the enterprise.

The definition was given by the Government for the guidance of the Standing Committee on Parastatal Organisations, which was appointed by the President by General Notice No. 1976 of 1967, to examine the salary structure and conditions of service of the employees of the parastatal organisations, including their fringe benefits, and also to protect any misuse of public funds. The functions of the institution will be discussed at some length later in a separate section. However, it is surprising and difficult to appreciate that even the legal draftsmen could not provide a precise, accurate and uniform definition for this expression. In order to justify the above comment, let us now consider the statutory definition of this expression appearing in the various statutes and orders.

Section 2 of the Tanzania Investment Bank Act, 1970 ,
(No.20), defines the term as follows:

"Parastatal organization" means any body established by or under any written law other than a Company registered under the Companies Ordinance (Cap. 212), save where the whole of the issued share capital of such company is owned by the Government.

It is needless to say that this definition is far from satisfactory, because it is a narrow one and it does not include a company (i) which is wholly owned by parastatal organisations, (ii) where the majority shareholding is owned either by the Government or by any other parastatal

organisations , and (iii) where the Government exercises an effective influence in the management .

A slightly wider definition than the above one is provided by Section 2 of the Parastatal Organizations (Financial Supervision and Control) Act, 1975, which states:

Parastatal organisation means any body corporate established by or under any written law other than

- (a) a company incorporated or registered under Companies Ordinance;
- (b) the Community, the Corporations within the Community and bodies corporate established by or under any Act of the Community,

but includes any Company, the whole of the share capital of which is owned by the Government or any parastatal organisation (including any such company).

Happily, however, the definition includes companies where the whole of the issued share capital is held either by the State or any parastatal organisation . This definition again leaves out the companies in which the State or any parastatal organisation has either majority shareholdings or other forms of Governmental participation and effective influence in all aspects of management .

Section 2 of the Parastatal Employees (Recovery of Debts) Act, 1974, includes companies where the majority shareholding is owned either

by the State or many other parastatal organisations as well as trade and political unions, but still excludes companies where the Government exercises influence in the management. Section 2 defines it thus:

"Parastatal organization" means:-

- (a) a local authority;
- (b) a body corporate established by or under any Act or Ordinance other than the Companies Ordinance (Cap. 212);
- (c) the Tanganyika African National Union, any organ of the Tanganyika African National Union and every body of persons, whether corporate or unincorporate, which is affiliated to the Tanganyika African National Union;
- (d) a trade union registered under the Trade Union Ordinance (Cap.318);
- (e) any Company registered under the Companies Ordinance not less than fifty per centum of the issued share capital of which is owned by the Government or a parastatal organization or, where the company is limited by guarantee, a company in respect of which the amount that the Government or the parastatal organisation which is a member of such company has undertaken to contribute in the event of the company being wound up is not less than fifty per centum of the aggregate amount which all the members have undertaken to contribute, and references in this paragraph to a parastatal organisation include references to any such company.

The Government's official statement (GN No.1976 of 1967) regarding the parastatal organisation is perhaps reflected in the definition provided by paragraph 2 of the Tanzanian Legal Corporation (Establishment) Order, 1970, (GN, No.32), which states that:

'parastatal organization' means -

- (a) a body corporate established by or under any written law other than -
 - (i) a company incorporated under the Companies Ordinance;
 - (ii) a body corporate established by or under any Act of the Community;
 - (iii) a local authority.
- (b) any company registered under the Companies Ordinance, not less than fifty per centum of the issued share capital of which is owned by the Government, a Local Authority or any parastatal organization or, where the company is limited by guarantee, a company in respect of which the amount that the Government, a Local Authority or a parastatal organisation which is a member of such company has undertaken to contribute in the event of the company being wound up is not less than fifty per centum of the aggregate amount which all members have undertaken to contribute; and references in this paragraph to a parastatal organisation include reference to any such company.
- (c) any body of persons, whether corporate or unincorporate, which is designated by the Minister by Notice in the Gazette to be a parastatal organization for the purpose of this order.

It is clause (c) above which has given wide powers to the Minister to bring in any institution within the ambit of the parastatal organisations. However, our study has been unable to find a case where the Minister has exercised this power. The diversity of the definition may not have caused any particular problem in Tanzania, but surely a standard and uniform definition will be helpful for two reasons: Firstly, foreign investors and businessmen may wish to deal with parastatals only for a variety of reasons, for example, security of investment. Secondly, foreign Governments may prefer to guarantee foreign investments of their citizens if such investments are made in parastatals.

5.4 Distinction between Statutory Corporation, Public Corporation and Company

'Parastatal organisations' can be classified into three categories, namely: (a) Statutory Corporations, (b) Public Corporations and (c) Companies.

In most countries, including the U.K. and India, the phrases 'public corporation' and 'statutory corporation' are synonymous. But in Tanzania, especially since 1969, one can be distinguished from the other. The former is established by an order ^{under} /the Public Corporation Act, 1969. The latter is set up by or under any written law or by ^{other} any Act.

Section 2 of the Public Corporation Act, 1969, defines the two corporations thus:

'Public Corporation' means any public corporation established by an order under the Act, and 'Statutory Corporation' means any body corporate established by or under any written law other than an Act of the Community, but does not include a company incorporated under the Companies Ordinance save where the whole of the share capital of such company is owned by a Statutory Corporation or two or more Statutory Corporations, and references in this paragraph to a Statutory Corporation include references to any other company the whole of the share capital of which is so owned.

The general characteristics of a statutory corporations have been mentioned in great detail in the previous Chapter. A statutory corporation, in Tanzania, enjoys the same status and privileges as that of an Indian corporation, i.e. (i) It is wholly owned by the State; (ii) It is created by special law defining its objects, demarcating the powers, privileges of government, the management and the relations that will subsist between them; (iii) It is a body corporate and has separate legal existence and hence, can sue and be sued, enter into contracts and acquire property in its own name; (iv) It is not subject to governmental budget, etc. Some of these corporations have share capital. The notable corporations in this group are: (i) the Bank of Tanzania; (ii) the National Bank of Commerce; (iii) Tanzania Investment Bank; (iv) Treasury Registrar, and (v) Tanzania Rural Development Bank.

The President is empowered to establish public corporations under Section 3 of the Public Corporation Act, 1969, which provides:

- (1) The President may, by order published in the Gazette, establish a public corporation for such functions as may be specified in such order.
- (2) Every public corporation established by an order made under this section shall (a) have perpetual succession and a common seal; (b) in its corporate name be capable of suing and being sued; and (c) subject to the provisions of this Act and of

any order made in that behalf by the President, be capable of purchasing and otherwise acquiring, and alienating any property, movable or immovable.

Corporations of this type do not possess share capital. Their activities are regulated by the principal Acts. The other important points of difference between the two categories will be mentioned as we proceed. The principal "public corporations" are the National Development Corporation, the Tanzanian Tourist Corporation, the National Agricultural & Food Corporation, and the Tanzanian Legal Corporation.

The enactment of the Public Corporation Act, 1969, has undoubtedly simplified the procedure for the creation of a corporation. Prior to this, a special Act was necessary to set up a corporation, but now a corporation is born by an order of the President. The President is also empowered to reorganise and even to terminate the existence of any existing corporation (whether public or statutory) under Section 8(1) of the Act, which provides:

Where the President has established or establishes a public corporation, or any statutory corporation has been established, for the performance of any functions and the President is satisfied that there exists any other public corporation or statutory corporation (hereinafter referred to as 'the existing corporation')

for the performance of all or any of the functions for which such public corporation or statutory corporation is or has been established, the President may -

- (a) by order in the Gazette provide that the existing corporation shall cease to exist or shall cease to perform all or any of the functions which are conferred upon the public corporation or the statutory corporation, as the case may be;
- (b) by order transfer any asset or liability of the existing corporation to the public corporation or the statutory corporation as the case may be;
- (c) by order transfer any person who is an employee of the existing corporation to the service of the public corporation or the statutory corporation, as the case may be.

In effect, the President can repeal a statute (Setting up a Statutory Corporation) by order. However, on this Act, Read comments aptly that:

It may well appear in practice to be the source of the law which has changed in essentials, rather than its contents, but the new system undoubtedly gives greater flexibility, for example, for shifting spheres of activity between parastatals. 21

In accordance with the provisions of the Public Corporations Act, 1969, the President issued a circular²² which divided the National Development Corporation, set up by the National Development Corporation Act, 1964, into three parastatals: the new National Development Corporation, the Tanzanian Tourist Corporation and the National Agricultural and Food Corporation. The Tourist and Agricultural functions of the old National Development Corporation were transferred to the Tanzanian Tourist Corporation, and the National Agricultural and Food Corporation, respectively. And the new National Development Corporation was entrusted with the following functions:

- (a) to promote the development of manufacturing, processing and mining industries;
- (b) to conduct or engage in the businesses of manufacturers, processors, producers, packers, craftsmen, engineers, assemblers, tanners, brewers, millers, miners, and such other businesses relating to industrial activities or the use of mineral resources as the Board may from time to time decide;
- (c) to establish branches and carry on business either within the United Republic or elsewhere;
- (d) to acquire by agreement and hold interests in any undertaking, enterprise or project associated with industrial development;

22. The Presidential Circular No.2 of 1969.

- (e) to manage the affairs of any corporation, company, firm or other body the interests of which are transferred to or acquired by the corporation under the provisions of the Act or this order;
- (f) to do all such acts and things as may be necessary to uphold and support the credit of the Corporation and to obtain and justify public confidence and to avert or minimize any loss to the Corporation;
- (g) to do anything or enter into any transaction which, in the opinion of the Board, is calculated to facilitate the proper and efficient carrying on of its activities and the proper performance of its functions. (23)

The failure of the old National Development Corporation (NDC) was due to the fact that it was responsible alone "to facilitate and promote the economic development and the participation of other persons and bodies in the economic development of the entire country".²⁴ As a result of the wide extent of these powers, the old NDC had:

23. Paragraph 4 of the National Development Corporation (Establishment) Order, 1969, GN No.90 on 11 April, 1969.

24. Section 4 of the Tanganyika Development Corporations Act, 1962, as amended by Section 6 of Tanganyika Development Corporations Act of 1964, No. 69.

over seventy subsidiary and associate companies and their functions were equally numerous ranging from "diamonds" to "milk."²⁵ It thereby became very large and was going beyond the scope of effective control and planning while the country's needs demanded more and more public enterprises along Socialist lines. 25

In order to rectify the above mistake it became essential to set up new institutions with defined areas of operation. And the new NDC's function is now confined mainly to promote the development of manufacturing, processing and mining industries.

The Presidential Circular²⁶ also admitted that :

the present number and structure of parastatal organisation in Tanzania is not the result of any well-thought out comprehensive plan. It is the result of a series of decisions taken since Independence, and in particular the implementation of the Arusha Declaration in February 1967. The result is that we now have one (corporation i.e. N.D.C.) whose responsibilities are so large and diverse that almost every economic Ministry of Government is involved in its activities.

It is suggested that the activities of the National Development Corporation are divided in such a manner that Government control and administration

25. P. Oluyede: Administrative Law in East Africa (1973), page 149.

26. The Presidential Circular No. 2 of 1969.

would be simplified and made more effective. The Circular went on to add that "this new organisation structure was to be based on the following principles".²⁷

1. broad policy is a matter for the elected TANU Government of Tanzania, and the parastatal organisations are instruments of execution.
2. the parastatal organisations cannot be run in ways similar to a Government department, so that flexibility of organisation and day-to-day administration is essential if real service is to be given to the people by the public sector of the economy.
3. the parastatal organisations are not spending organisations; they provide goods and services in return for payment, and in our circumstances they must not only pay their own way but also take part in capital creation.
4. each parastatal organisation should be responsible to one sectoral ministry;
5. the overall structure must be such that increasing public enterprise and public economic initiative can continue to be effectively controlled and co-ordinated by Government as the economy expands. This demands a three-level structure: the parastatal organisation, the sectoral ministry and the President through the Central Coordinating Ministries.

27. Ibid.

In one respect, we think that this structural pattern is open to criticism. As the broad policy will be dictated and determined by the TANU Government officials, it is highly unlikely that 'flexibility of organisation and day-to-day administration' will be left entirely in the hands of the board of management. In theory, the Corporation is to be run by the board of directors subject to directives issued by the President or his delegates (i.e. ministers). But "no agreement can now be concluded by a parastatal unless and until it is approved by the Committee on parastatal organisations and the Economic Committee of the Cabinet."²⁸ The total effect is that the Government, in fact, involves itself in the running of the Corporation. Furthermore, as the members of the board are appointed either by the President or by the Ministers, it is expected that the board is to confirm its directives from the appointer. It is appropriate to mention that most of the delegates (i.e. ministers) are also the members of the Economic Committee of the Cabinet. Therefore, one can conclude that the real power of control, in effect, lies with the Government. The functions of the Standing Committee on Parastatal organisations will be discussed later.

However, a Government company, on the other hand, comes into existence either by fulfilling the requirements as laid down in the Companies

28. R.W. James and S.L. Gunya: "Organizational Relationship and the Control of Parastatals in Tanzania", EALR (1972), page 60.

Ordinance (Cap 212) or by acquiring compulsorily or by agreements, the majority shareholdings of an existing company.

With these preliminary remarks we will now examine the boards of management, their composition, functions and powers, and where the main responsibility lies for the successful and efficient planning and operation of the parastatals.

5.5. Boards of Management: (i) Appointment and Removal

The composition of the board is undoubtedly a matter of great importance. If, therefore, an enterprise is to achieve its objectives, the membership of the board should be on the basis of ability, competence, initiative and experience.

In the case of most statutory and public corporations, the responsibility for the proper running is vested in the board of directors. The members of the board are usually appointed by the Minister, except the Chairman who is appointed in each case by the President. This basic power of appointment makes the Minister very powerful. He can choose anyone he likes irrespective of his ability, experience and competence. "Practice indicates that Ministers in all three countries (Tanzania, Kenya and Uganda) are prepared to use, and use frequently, their powers, especially in the interests of politics."²⁹ It is surprising that this view has not been substantiated by any proof. However, in a one-party State this claim would have very little relevance and significance.

But provisions are also to be found in the constitutions of certain boards for the inclusion of persons who have had experience of, and shown capacity in industrial, commercial or financial matters, administration or

29. A.W. Bradley and J.P.W. McAuslan: "Public Corporations in East Africa" in Government Enterprise, Friedmann and Garner (Ed.), page 273.

the organisation of workers,³⁰ experience in economic and financial matters or in banking,³¹ in rural development, agriculture, small scale industries, Ujamaa villages and co-operatives.³² This provision in the Statutes if strictly observed, would impose some kind of restriction on the Ministers to appoint whomever pleases as a member of the board. But it could also be argued that it is difficult for the Minister concerned to be so selective in a nation where there is an acute shortage of qualified and skilled personnel.

In most public corporations created by Presidential Orders, the structure of the Boards is uniform. In each case, the management is vested in a Board of Directors which consists of a Chairman appointed by the President and such other members being not less than five nor more than nine as the Minister may appoint and a General Manager who is appointed by the President.³³ But in case of the Tanzania Legal Corporation, the Board will consist of a Chairman nominated by the President and such other members, being not less than three nor more than five, as the Minister for Legal Affairs may appoint after consultation with the

30. S.5(3), NBC Act, 1967.

31. S.20(7), TIB Act, 1970.

32. S.20(4), TRDB Act, 1971.

33. Paragraph 5(1) to 5(3), NAFC (Establishment) Order, 1969;
 " " " " NDC (Establishment) Order, 1969;
 " " " " TTC (Establishment) Order, 1969.

Attorney-General.³⁴ All the Orders creating public corporations provide for the office of Vice-Chairman, who is appointed by the Minister concerned. It is interesting to note that no specific functions are allocated to the office of Vice-Chairman. In addition to the above officials, the Minister, in the case of the Tanzania Legal Corporation, is empowered to appoint a Chief Corporation Counsel who is the Chief Executive Officer of the Corporation.³⁵

In most statutory corporations, the management is vested in a Board of Directors. The Constitution of the Bank of Tanzania established in 1967 is simple. It consists of a Governor who is a Chairman, a Director-General who is a Deputy Chairman appointed by the President, the Principal Secretary to the Treasury and five directors appointed by the Minister for Finance.³⁶ In the case of the National Bank of Commerce, the Board of Directors consists of a Chairman appointed by the President, a General Manager and such other members being not less than five nor more than nine as the Minister for Finance may appoint.³⁷ Section 5(1) of the State Trading Corporation also provides for the creation of a board of directors which consists of a Chairman appointed by the President, a General

34. Paragraph 5(1) to 5(2), T.L.C. (Establishment) Order, 1970.

35. Paragraph 5(4).

36. S.7(1) to 7(3), Bank of Tanzania Act, 1967.

37. S.5(2), National Bank of Commerce Act, 1967.

Manager and such other members being not less than five nor more than nine as the Minister for Commerce may appoint.³⁸ The composition of the board of directors of the Tanzania Investment Bank established in 1970, is somewhat different. It consists of a Chairman who is the Managing Director appointed by the President and six other directors, of which three are appointed by the Minister for Finance, two are appointed by the National Bank of Commerce, and one is appointed by the National Insurance Corporation Limited. The shareholders (i.e. N.B.C. and N.I.C.) are eligible to appoint directors by notice in writing addressed to the Bank and they can cancel such appointment at any time by such notice.³⁹ The Tanzania Rural Development Bank consists of a Chairman appointed by the President and eight other directors appointed by the Minister for Finance.⁴⁰

It is evident from the above that the Minister has considerable power in the matter of appointment of the members of the governing board. Although some statutes empower the board of directors to appoint the Chief Executive,⁴¹ i.e. the General Manager of a Corporation subject to the approval of the Minister, or the Minister is empowered to appoint such a

38. This institution was dissolved in 1974 and 25 companies were formed to continue its functions.

39. S.20(3) to 20(6), Tanzania Investment Bank Act, 1970.

40. S.20(3), T.R.D. Act, 1971.

41. S.5(4), N.B.C. Act, 1967.

person after consultation with the board of directors.⁴² But in effect, the decision of the Minister is likely to prevail as he has the power to appoint the members of the board, and the provision becomes a nullity.

With regard to removal, the Ministers are given unfettered power. The Bank of Tanzania Act, 1967, empowers the President to remove a director only for inability to discharge the functions of his office or for misbehaviour (whether in connection with his office or otherwise).⁴³ Under the Tanzania Investment Bank Act, 1970, the Minister for Finance has the power to remove, after consultation with the Board of Directors.⁴⁴ A similar provision is found in the Tanzania Rural Development Act, 1971.⁴⁵ Most public corporations established in accordance with the provision of the Public Corporation Act, 1969, have a provision as follows: "The Minister may make regulations with respect to the appointment of the tenure and vacation of office".⁴⁶ An exactly similar provision exists in the National Bank of Commerce Act, 1967.⁴⁷ The members

42. S.22(1), T.I.B. Act, 1970, and 22(1), T.R.D.C. Act, 1971.

43. S.8(3), B.O.T. Act, 1967.

44. S.22(3), T.I.B. Act, 1970.

45. S.22(3), T.R.D.B. Act, 1971.

46. Paragraph 5(b)(a), N.A.F.C. Order, 1969, N.D.C. Order, 1969, T.T.C. Order, 1969, 5(7), TL.C. Order, 1970.

47. S.5(b)(a).

of the board are usually appointed for two or three or five year-terms, which are renewable. But there seems to be no provision in the statutes or orders regarding the ineligibility of a member of any corporation for appointment for a further term. It obviously means that the relevant Minister has the power to reappoint members at the end of their terms of office. Such a power has a tendency to encourage subservience to the appointing authority.

It is noticeable that statutes or orders creating corporations contain no clause disqualifying a person from the membership of the Corporation, but only in the case of the Bank of Tanzania, the creating statute contains express provisions relating to disqualification from membership. Section 8(1) of the above Act provides that :

no person shall be qualified to be appointed a member of the Board, or an alternate for a member, if he is -

- (a) a member of the National Assembly.
- (b) a person holding office in the service of the United Republic;
- (c) a director, officer, employee or shareholder of a bank in respect of which the Bank may exercise a regulatory power under Part IV.

Section 8(2) further provides that:

a member of the Board or alternate shall vacate his office if -

- (a) he acquires any attribute which, were he not a member, would disqualify him for appointment under sub-section (1);
- (b) he becomes bankrupt or suspends payment or compounds with his creditors;
- (c) he is adjudged or otherwise declared to be of unsound mind; or
- (d) he is absent, without the leave of the Board, from the meetings of the Board for a consecutive period of three months.

We are unable to understand why this provision has not been inserted in other statutes or orders creating corporations.⁴⁸ We say this because our study has not found that by subsequent regulations this provision has been included in the statutes or orders.

48. For a full discussion, see Bradley & McAuslan, "Public Corporations in East Africa", Government Enterprise, Friedmann & Garner (Ed.), pages 290-291.

5.6 Use of the General Direction

The influence which a Minister can exert is a combination of the various formal powers provided by the respective statutes, and the influence arising from the informal contacts between the Minister and his department and the corporation and its staff. It is not impossible, however, for a Minister to secure a considerable direction of the affairs of a corporation by using his formal powers and informal influence. There is a popular tendency to regard the general power of direction as a means whereby a Minister can have the final say in any dispute between himself and the board. But the use of direction would be justified if it is used to share and define their respective responsibilities for policies based on social and economic grounds on the one side, and on commercial considerations on the other. If the direction is used in this spirit, then a Minister by using the general direction would be able to tell a corporation the social and economic objectives within which he expected the industry to operate and the board would be left free to pursue its undertaking in a commercial manner within the limits laid down - thus to minimise the conflict between the two.

A scrutiny of the various Acts and Orders establishing statutory and public corporations disclosed that provisions empowering the Minister to give directions are present in every statute with the exception of the

Bank of Tanzania and the Tanzania Audit Corporation, which is subject to directions from the Controller and Auditor-General.

These directions are usually of a general character, but in the case of the public corporations, the President has the power to issue directions in regard to specific matters as well. Section 6 of the Public Corporation Act, 1969, provides that:

the President may give to the Board of Directors of any public corporation, or to any other person entrusted with the management of the corporation, directions of a general or specific character as to the exercise and performance by such Board or such person of their or his functions, and such Board or person shall give effect to any such directions.

But in the case of statutory corporations,⁴⁹ the Minister may give such directions after consultation with the Governor of the Bank of Tanzania as to the exercise and performance by the Board of their functions in relation to matters appearing to the Minister to affect the national interest, and the Board shall give effect to any such directions.

It is interesting to point out that in the case of statutory corporations, the directions are issued to the board and only in matters affecting

49. S.6(1), N.B.C. Act, 1967; S.20(2), T.I.B. Act, 1970; S.20(2), T.R.D.B. Act, 1971.

national interest, but in the case of the public corporations, the directions are issued not only to the board but also to any person entrusted with the management. However, in both cases these directions are obligatory on the part of the corporations to shape their activities in accordance with them.

It is true to say, therefore, that as regards the constitution of the board of directors and the form of general directions of policy, the Tanzanian Corporations have followed the British pattern.⁵⁰

The form of direction created for the nationalised enterprises is not particularly novel but resembles the general pattern of nationalised industries in the United Kingdom, in the structure of the Board and their relationships with the respective Ministers. 51

However, besides directives issued by the Minister, the Standing Committee on Parastatal Organisations are also empowered to issue directives to boards of parastatals.

The SCOPO has issued a directive⁵² restricting transfer of party branch chairmen and secretaries in national institutions. It has

50. For a full discussion of British model, see J.F. Garner: Public Corporations in the United Kingdom, in Government Enterprise, Friedmann & Garner (Ed.), pages 3 to 25.

51. J.S. Read: "Tanzania" - Annual Survey of African Law, 1967, page 172.

52. The Daily News, 10 March, 1976.

also banned all TANU meetings during office hours. The directive said that transfer will only be made under the following conditions:

- (a) when such a worker has been promoted and his services are needed elsewhere;
- (b) when a party leader can no longer be usefully employed at his place of work;
- (c) transfer on health grounds; and
- (d) when a worker is involved in acts of discipline.

The directive, however, does not cover TANU Secretaries appointed by the Party's Central Committee to work in national institutions. A meeting can be held during office hours in an unavoidable circumstance, in which case a decision should be reached between party leaders and management.

The directive also stated that "transfer of party leaders because of personal conflict will create a sense of fear among TANU leaders towards management and this does not conform to the aim of forming TANU branches at place of work".⁵³

The directive, in effect, has curtailed the power of the board of management to transfer a party official from one place to another.

53. Ibid.

5.7 Statutory Powers and Functions

It is a matter of real importance that the board of directors ought to be aware of the powers and functions of a corporation so that they restrict their activities within the framework laid down by the respective statutes or orders.

The Bank of Tanzania Act, 1967,⁵⁴ and the National Bank of Commerce Act, 1967,⁵⁵ followed the same pattern of a general powers clause followed by a specific enumeration of powers without prejudice to the scope of the general power.

Section 5(1) of the Bank of Tanzania Act, 1967, provides that "the principal functions of the Bank shall be to exercise the functions of a central bank". The principal functions are summarised below:

- (a) It is the government's bank. It handles the income and expenditure of the government departments.⁵⁶
- (b) It has the responsibility for carrying out the government's monetary and fiscal policies.⁵⁷

54. S.5(1).

55. S.4(1).

56. S.37(1) to (2).

57. S.38.

- (c) It makes advances to the Government.⁵⁸
- (d) It manages the National Debt. This is a large responsibility and involves making repayments on governments securities when they mature, floating new issues of long-term securities, making regular payments of interest to existing holders of securities.⁵⁹
- (e) It is the banker's bank. Other banks maintain accounts with it.⁶⁰
- (f) It rediscounts bills of exchange and promissory notes.⁶¹

The Bank is also empowered to issue currency, to regulate banking and credit, to manage the gold and foreign exchange reserves of Tanzania, and to perform any function conferred upon it by or under any international agreement to which Tanzania is a party.

Section 5(2) of the Act authorises the bank to direct its activities to the promotion of credit and exchange conditions conducive to the rapid growth of the national economy of Tanzania, due regard being had to the desirability of fostering monetary stability. The bank is bound to give advice to government on any matters relating to its functions, powers and duties under this or any other law and the Government may require the bank

58. S.39.

59. S.40

60. S.43(1) & (2).

61. S.44.

to give advice on matter relating to the functions, powers and duties of the bank and the bank shall give its advice accordingly.⁶²

The kinds of business the Bank of Tanzania cannot transact are enumerated in detail in Section 62(1) of the Act. It lays down that:

the bank shall not

- (a) engage in trade or own or acquire any direct interest in any commercial or similar undertakings unless otherwise expressly authorised by this Act;
- (b) purchase, acquire or lease immovable property for the use of the members of the board or the staff, except for its own use as premises for the bank;
- (c) draw or accept bills payable otherwise than for demand; or
- (d) save for the purposes of giving effect to sub-section (2) of 12, ⁶³ guarantee any loan, advance or investment.

The main objects ⁶⁴ of the National Bank of Commerce are:-

- (a) to provide in accordance with the conditions appropriate in the normal and proper conduct of banking business, adequate and properly banking services and facilities throughout the United Republic;

62. S.61(1) & (2).

63. The powers of the Board to make provisions for the staff of the bank shall include power to provide for benefits for or in respect of those of its staff who die or retire, and their surviving dependants, and such other benefits and facilities as are usually accorded to employees in Tanzania.

64. S.4(1), N.B.C. Act, 1967.

- (b) to conduct its business without discrimination except on such grounds as are appropriate in the normal and proper conduct of banking business;
- (c) not to divulge any information to, or to the affairs of, a customer of the National Bank, except in circumstances in which it is in accordance with any written law or the practices and usages customary among bankers, necessary or proper for the National Bank to divulge that information.

With regard to the discrimination clause, A.W. Bradley has this to say:

This clause, although its meaning may be arguable, seems particularly apposite to banking in Tanzania where it has been alleged that racial factors made it easier for some persons to borrow from the banks than others. ⁶⁵

The insertion of this clause in the Act would be very much appreciated by the disadvantaged groups, but it remains to be seen whether just a provision like this would be able to overcome the racial problems.

Regarding clause (c) above, A.W. Bradley is of the opinion that: "this might seem to conflict with the duty of the Bank to provide the Minister with information regarding its property and activities". ⁶⁶ But as we see it

65. A.W. Bradley, "Legal Aspects of Nationalisation Laws in Tanzania," EALJ, 1967, page 156.

66. Ibid. S.6(2), N.B.C. Act, 1967.

the question of conflict of duty does not arise because the second part of clause (c) specifically provides that the bank is well within its right to divulge information, if the activities of a customer fall outside the normal banking practices and, therefore, the Minister will be justified in asking for any information in respect of a customer whose activities are considered to be prejudicial to the national interest, i.e. violation of foreign exchange regulations and payments received from and paid to a person not properly accounted for, etc.

Section 4(2) of the National Bank of Commerce Act, 1967, empowers the bank also to:

- (a) carry on the business of banking in all its branches and departments, including borrowing, raising or taking up money, lending or dealing in bills of exchange, promissory notes, coupons, drafts, bills of lading, warrants, debentures, certificates, scrip and other instruments and securities, whether transferable or negotiable, or not; granting and issuing letters of credit and circular notes; buying, selling and dealing in bullion and species, acquiring, holding, and issuing on commission, underwriting and dealing with stocks, funds, shares, debentures, debenture stock, bonds, obligations, securities and investment of all kinds, the negotiating of loans and advances; receiving money and valuables on deposit; or for safe custody, or otherwise; collecting

and transmitting money and securities; managing property, and transacting all kinds of agency business commonly transacted by bankers;

- (b) undertake and execute any trusts the undertaking whereof may seem desirable, and also to undertake the office of executor, administrator, receiver, treasurer, registrar or auditor, and to keep for any company, Government authority, or body, any register relating to any stocks, funds, shares or securities, or to undertake any duties in relation to the registration of transfers and the issue of certificates;
- (c) take or concur in taking all such steps and proceedings as may seem best calculated to uphold and support the credit of the National Bank, and to obtain and justify public confidence and avert or minimise financial disturbances which might affect the National Bank.

According to the Annual Report of 1974-75, the N.B.C. has satisfactorily carried out its banking functions. It has realised a surplus of shs. 141.9m/- during this period. The Report says that lending increased by shs. 656m/- or 32.9 per cent to shs. 2.446m/-, while total investment rose from the previous year's level of shs. 515.3m/- to shs. 1081m/-, an increase of 109.76 per cent, thereby affecting the Bank's liquidity. This, according to the Report, was a result of financing the importation of food grains

following the previous year's drought.⁶⁷

The Bank's surplus has further improved from shs. 141.9m/- as at 30th June 1975 to a net surplus of shs. 197.8m/- as at 30th June 1977. The return on equity capital employed averaged 118% indicating a satisfactory return on capital employed. The lending activities of the bank has also increased substantially. The lending has increased from shs. 2.446m/- in 1975 to shs. 3,196.6m/- in 1977. Of the total lending of shs. 3,196.6m/- approximately shs. 2811.3m/- or 88 per cent was channelled to the public sector. 68

In the Tanzania Investment Bank Act, 1970, the Tanzania Rural Development Bank Act, 1971, the National Agricultural and Food Corporation (Establishment) Order, 1969, the National Development Corporation (Establishment) Order, 1969, the Tanzania Tourist Corporation (Establishment) Order, 1969, the Tanzania Legal Corporation (Establishment) Order, 1970, however, there is no general powers clause and the powers of the Corporations are defined by way of enumeration only.

The Tanzania Investment Bank provides medium and long-term finance for economic development and technical assistance and advice for

67. The Daily News, 3 February, 1976.

68. The Economist (London), 11 March, 1978.

the purpose of promoting industrial development.⁶⁹ The functions of the bank also include administering such special funds as may from time to time be placed at the disposal of the bank, and to undertake such other activities as may be necessary or advantageous for the purpose of furthering the foregoing objects.⁷⁰ The business transacted by it includes the guaranteeing of loans by a borrower for a specific project and granting loans repayable within a specified period.⁷¹ In granting or guaranteeing a loan, the bank must be satisfied that the borrower and its guarantor will be able to meeting their obligations under the loan contract. The bank is entitled to charge interest, fee and commission for its risks. It is also the responsibility of the bank to ensure that the proceeds of any loan made or guaranteed by the bank are used only for the purposes for which the loan was granted, and the bank may ask the borrower to provide information and allow inspection of its books and records during such time as any part of the loan remains outstanding.

In addition to the above, Section 16 of the Act has empowered the bank -

- (a) to borrow funds in Tanzania or elsewhere, and in this connection, to furnish such collateral or other security therefor as the Bank

69. S.4(a) &(b), T.I.B. Act, 1970.

70. S.4(c) & (d).

71. S.12.

shall determine;

- (b) to buy and sell securities which the Bank has issued or guaranteed or in which it has invested;
- (c) to guarantee securities in which it has invested in order to facilitate their sale;
- (d) to invest funds not immediately needed in its operation in such securities as it may determine and invest funds held by the Bank for pensions or similar purposes in trustee securities;
- (e) to provide technical advice and assistance which may serve its purposes and fall within its objects and where appropriate, the Bank charge for such services; and
- (f) to study and promote investment opportunities.

The Tanzania Investment Bank issued loans totalling shs. 128.33m/- to 22 firms in the country during 1974-75. Since its inception in 1970, the Bank has given totally 299.217m/- to finance 73 projects. According to the T.I.B. Chairman and Managing Director, Ndugu G.F. Mitowe, the year under review (1975-76) has been the most active period of the Bank since it was established. The Report notes that the Bank faced problems in appraising projects which contained very little information.⁷²

72. The Daily News, 5 December, 1975.

Identical provisions, as above, appear in the Tanzanian Rural Development Bank Act, 1971,⁷³ with the exception that the loan so made or guaranteed by the bank must be utilised for rural development only.

The Tanzania Rural Development Bank has issued loans amounting to shs.

591m/- for development projects in the country since its formation in 1971.

The projects include transportation, animal husbandry, small-scale industries, fishing and agricultural activities.⁷⁴

It is of interest to note that although the different public corporations are set up for different objectives, similar powers are given to each corporation. These powers are very wide, for examples, clauses (f) and (g) of paragraph 4⁷⁵ of each Corporation, provide that a Corporation is empowered to do all such acts and things as may be necessary to uphold and support the credit of the Corporation and to obtain and justify public confidence, and to avert or minimise any loss to the Corporation and to do any thing or enter into any transaction which, in the opinion of the Board, is calculated to facilitate the proper and efficient carrying on of its activities and the proper performance of its functions. Each board has the power to regulate its own procedure subject to the provisions of any regulation made by the

73. SS.4, 12 and 16.

74. The Daily News, 23 June, 1976.

75. The N.A.F.C. (Establishment) Order, 1969, the N.D.C. (Est.) Order, 1969, the T.T.C. (Est.) Order, 1969, 4(1)(c), T.L.C. (Est.) Order, 1970.

relevant Ministers.⁷⁶

We may now note the functions of the above Public Corporations. The National Agricultural and Food Corporation has been given power to promote agricultural development and the production of food, to conduct or engage in the businesses of growers, planters, dealers, processors, importers, exporters of such agricultural products, including livestock, to establish branches and carry on business either within the United Republic or elsewhere, to acquire by agreement and hold interests in any undertaking, enterprise or project associated with agricultural development or the production of food, and to manage the affairs of any Corporation, Company, Firm or other body, the interests of which are transferred to or acquired by the Corporation under the provisions of the Act or this Order.⁷⁷

The Tanzania Tourist Corporation is empowered to promote the tourist industry in all its aspects, to conduct or engage in the businesses of tour operators, travel agents, hotel developers, hotel managers, publicity agents, advertising agents, printers, publishers, film distributors, film exhibitors, and such other businesses pertaining to the tourist industry, to establish branches and carry on business anywhere, to acquire by agreement and hold interests in any undertaking, enterprise or project associated

76. Ibid., paragraph 5(7).

77. Paragraph 4(a) to 4(e).

with the development of the tourist industry and to manage the affairs of any forms of enterprise, the interests of which are transferred to or acquired by the Corporation under the provisions of the Act or this Order.⁷⁸

The Tanzania Legal Corporation is created to provide legal services to parastatal organisations on such terms and conditions as may be agreed upon between them and the Corporations, and such legal services to the Government as the Attorney-General may direct.⁷⁹ Paragraph 4(2) provides that the Corporation ought to perform its functions in accordance with the best professional standards.

We now face a vital question of real importance and significance - where lies the real power of authority in a one-party State? Is it with the Government or is it with the Party, or is it with the board of management?

Nyerere has spelt out in unequivocal terms the relationships that should exist between the three organs. "A Government", he said,

is an institution which always uses force: that is why the Constitution had to be amended so that the Government would always be enjoined to remember that when it makes decisions it does so on behalf of the people. The Government had always to be reminded that it was the party's instrument of law enforcement. 80

78. Paragraph 4(a) to 4(e).

79. Paragraph 4(1)(a) to 4(1)(b).

80. "Tanzania" in the African Contemporary Record, 1975-76, Colin Legum (Ed.), page B17.

This means that the people of Tanzania have accepted the party supremacy over the Government. In other words, the Government is subordinate to the Party. In January, 1975, TANU Central Committee directed the Government to set in motion machinery to amend the Constitution so as to make the Party supreme.⁸¹ This would simply be giving political reinforcement to what was actually happening in fact. It means, in effect, that TANU is the real centre of power and decisions, not the Government.

The question now remains what should be the relationship between the Party and the board of management. Here is a conflict between real power and the legal power. The board of management has been empowered by statutes or orders to run the Corporations smoothly and efficiently without any interference but subject to directives issued by the President or his delegates. Are they then free to take decisions? It will be recalled that in all the Corporations the President appoints the Chairmen and the other members of the board may be appointed by the Minister where the President thinks it fit to delegate his powers to the Minister. Therefore, the real power resides with the President or the Minister. Even though the board of management is endowed with legal powers, in effect, they are subordinate to the Government and, in turn, the Government is subordinate to the Party. Therefore, the Party is supreme and its decision is final. Hence, the

81. "TANZANIA: TANU Supremacy", Africa (April, 1975), page 86.

board of management will have to shape their policy decisions in line with the Party's policy decisions.

However, the Party's influence and presence can also be felt in the National Institutions. The Party activists are much alive and take an active role in activities of these institutions.

The Party's call to establish TANU branches in industries and other places of work has been implemented by the National Bank of Commerce. There are now 19 branches. These branches are playing an active role in all activities of the bank, including organising political education for all cadres of staff, cultural activities, coordinating between the management and the workers, etc.⁸²

In June 1975, Ndugu Mhaviile, the Party National Executive Secretary, called on 25 TANU Secretaries who were appointed by the Party's Central Committee to various Corporations and Industries to co-operate with the management in executing their duties. "We expect you to co-operate and work for the common good - to put the interests of the and the Nation before anything",⁸³ he said. He expects both the management and functionaries to consult with each other in order to ensure

82. The Daily News (Tanzania), 7 February, 1976.

83. Ibid., 1 July, 1975.

the smooth running of their establishment.⁸⁴

This statement seems to suggest that there exists some tension at least between the management and the Party leaders.

84. *Ibid.*

5.8 Financial Structure

The method of providing finance to corporations varies from one country to another and also between different corporations within the same country. The usual practice is to provide the required capital to the corporations either in the form of loans or by guaranteeing the loans floated by them, or by acquiring the shares in the corporations. The financial string is considered to be a powerful weapon available to the Minister to exercise his control over a corporation.

The financial structure of the public corporations established under the Public Corporations Act, 1969, is simple and uniform. The original fund of the corporation is provided by the Government. Section 9(4) of the Public Corporations Act, 1969, also empowers the Government to raise money with the approval of the National Assembly, either within or outside the United Republic, for the purposes of the corporation and all monies so raised is to be charged and issued out of the Consolidated Fund, and when paid to the Corporation will form part of its fund. It is necessary to point out that the borrowing power of a public corporation is unlimited. Paragraph 9 of each of the Public Corporations provides that "the Corporation may from time to time borrow such sums of money as it may require to meet any of its obligations or for the purposes of its business." If the management is allowed to exercise this function freely, then the ministerial control over a public

corporation will be ineffective.

The Acts establishing the Bank of Tanzania, the National Bank of Commerce, the Tanzania Investment Bank and the Tanzania Rural Development Bank prescribe the authorised capital with which the Corporations have to function.⁸⁵ The Bank of Tanzania Act provides that the authorised capital is to be 200 million shillings and the issued capital is to be subscribed and held only by the United Republic.

In the case of the National Bank of Commerce, the initial legislation made no provision for capital but it was put right after four months by amending the original legislation.⁸⁶ The Act now provides that the authorised capital is to be 100 million shillings divided into 1,000 shares of 100,000 shillings each, all is to be subscribed and held by the United Republic. The shares are divided into paid-in shares and callable shares in the ratio of 1:3. The amounts subscribed to the callable shares are charged on the Consolidation Fund but payable only when required by the Bank to meet obligations which it cannot otherwise meet even by the use of the General Reserve or facilities obtained from the Bank of Tanzania.⁸⁷

85. S.14(1) & (2), Bank of Tanzania Act, 1967; S.2, N.B.C. (Amendment) Act, 1967; S.5(1) & (2), T.I.B. Act, 1970; S.5(1) & (2), T.R.D.B. Act, 1971.

86. See J.S. Read: "Tanzania", Annual Survey of African Law, 1967, page 170.

87. *Ibid.*

The authorised capital stock of the Tanzania Investment Bank is to be 100 million shillings divided into 100 shares, eaching have a par value of 1 million shillings. The shares are equally divided into paid-in shares and callable shares. The shares of the Bank are to be subscribed by the Government of the United Republic, the National Bank of Commerce and the National Insurance Corporation of Tanzania in the ratio of 6:3:1.⁸⁸ The authorised capital of the Bank is amenable to increase by a resolution of the board of directors, but no increase is possible without the approval of the Minister.⁸⁹

The Tanzania Rural Development^{Bank} Act provides that the authorised capital of the Bank is to be 100 million shillings, divided into 100 shares of 1 million shillings each.⁹⁰ A prescribed number of shares of the Bank are to be issued in the first instance divided equally into paid-in shares and callable shares, and the remaining shares will be issued from time to time in the proportion specified by a resolution of the board of directors.⁹¹ The authorised capital of the Bank may also be increased by the board of directors but it will not take effect without the approval of the Minister.⁹² The

88. S.6(1) & (2), T.I.B. Act, 1970.

89. *Ibid.*, S.5(3).

90. S.5(1).

91. S.5(2).

92. S.5(3) & (4).

issued capital is to be subscribed and held only by the Government of the United Republic.⁹³

The Bank of Tanzania, the Tanzania Investment Bank and the Tanzania Rural Development Bank are required by law to create a reserve fund.⁹⁴ The Bank of Tanzania, after consultation with the Minister, is to transfer to the general reserve fund - (i) if the amount of monies in that fund is less than the authorised capital of the Bank, not less than one-quarter of its net profits; or (ii) if the amount of monies in that fund equals or exceeds the authorised capital of the Bank but is less than three times the amount of that capital, not less than one-eighth of its net profits; and (iii) the remainder of the net profits of the Bank is to be paid into the Consolidated Fund.⁹⁶ The Act also provides that in the event of any net loss in excess of the monies standing to the credit of the general reserve fund of the Bank, is to be charged upon, and paid out of, the Consolidated Fund.⁹⁷

With respect to the Tanzania Investment Bank, it is provided that the Board of Directors should decide annually what part of the net income is to be transferred to the general reserve fund and what part is to be distributed to the shareholders. The question of distribution does not arise so

93. S.6(1).

94. S.15(1), B.O.T. Act, 1967; S.17(1), T.I.B. Act, 1970; S.17(1), T.R.D.B. Act, 1971.

95. S.15(2).

97. S.16(1).

long as the reserve fund is less than fifty percentum of the authorised capital.⁹⁸ An identical provision exists in the Tanzania Rural Development Bank Act, 1971.⁹⁹ The Rural Development Bank is empowered to use the general reserve fund in making good any loss or deficiency which may arise on the ordinary operations of the Bank.¹⁰⁰

The Bank of Tanzania, the Tanzania Investment Bank and the Tanzania Rural Development Bank are also required to make provisions for bad and doubtful debts, depreciation of assets, contributions to staff and superannuation funds.¹⁰¹ In addition to the general reserve fund, the Tanzania Investment Bank and the Tanzania Rural Development Bank are authorised to create special funds.¹⁰² The relevant section provides that the Bank may accept for administration from such sources as it may consider appropriate special funds which are intended to promote the objects of the Bank and such funds are to be used on terms and conditions consistent with the objects of the Bank. Tanzania still has a long way to go before it can attain economic independence. It is appropriate to mention that parastatal surpluses grew from shs. 626m/- in 1973 to

98. S.17(2).

99. S.17(2).

100. S.17(3).

101. S.15(2), Bank of Tanzania Act, 1967.

102. S.8(1), T.I.B. Act, 1970; S.8(1), T.R.D.B. Act, 1971.

shs. 693.3m/- in 1974, and shs. 800.3m/- in 1975 - rose again in 1976,¹⁰³ and the foreign capital received by parastatals increased from shs. 58.4m/- in 1969 to shs. 106.2m/- in 1976.¹⁰⁴ Hopefully, these could be used for economic development.

In almost all statutes there are provisions regarding maintenance of accounts. In the case of the public corporations established under the Public Corporations Act, 1969, these are to provide statements of account in such form as the President may direct to be prepared in respect of each financial year of the public corporation in such manner and in such form as the President may direct.¹⁰⁵

In the case of the Bank of Tanzania, the relevant provision runs as follows:

The Bank shall cause true and full accounts and records to be kept of all its transactions, and the books of account and records shall be kept at its head office and shall be open at all times to the inspection of the members of the Board.¹⁰⁶

103. "Tanzania" in the Africa Contemporary Record (1976-77), page B339.

104. Economic & Operations Report (Bank of Tanzania), June, 1976.

105. S.7(1).

106. S.17(2), B.O.T. Act, 1967.

The Bank is also required to submit to the Minister within three months after the close of each financial year, a statement of the Bank's operations throughout that year, together with the balance sheet and profit and loss account for that year, certified by the auditor.¹⁰⁷

Under Section 7(1) of the National Bank of Commerce Act, 1967, the board is to ensure that proper accounts and other records in relation thereto are kept by the National Bank and prepared in respect of each financial year of the Bank, a statement of accounts in such form as the Minister may direct, being a form which should conform with the best commercial standards.

The Tanzania Investment Bank Act, 1970, requires the board of directors to ensure that proper accounts and proper records are kept in relation to the operations of the Bank.¹⁰⁸ The Bank is to prepare and submit to the Minister for Finance, and to the shareholders, and to publish an annual report, together with an audited statement of its accounts.¹⁰⁹ It must also furnish a quarterly statement to its shareholders in respect of its financial position and a profit and loss account showing the results of its operation.¹¹⁰

107. S.18(1)(a).

108. S.23(1).

109. S.23(2).

110. S.23(3).

Identical provisions exist in the Tanzania Rural Development Act,
1971.¹¹¹

With regard to the existing staff of a Corporation, a provision similar to the one below does appear in various statutes¹¹² creating corporations, to protect the interests of the staff. We may note that Section 8(5) of the Public Corporations Act, 1969, which provides :

the President may transfer any employee of a Corporation to the service of another corporation -

- (a) such employee shall, as from the date of such transfer, be deemed to be an employee of the Corporation to which he is transferred;
- (b) the terms and conditions of service applicable to such employee after such transfer shall not be less favourable than those which were applicable to him immediately before the transfer, and for the purposes of determining any right to gratuity or any other superannuation benefit the service of such employee with the Corporation to which he is transferred shall be regarded as continuous with his service immediately preceding such transfer; and
- (c) the employment of such employee immediately prior to his transfer, and his employment by the Corporation to which he is transferred, shall be deemed to be con-

111. S.23(1), to 23(3).

112. See Bradley, *supra*,

tinuous employment by one employer within the meaning of section 8A of the Severance Allowance Act, 1962, and that Act shall apply to the parties in the same manner as it applies to the cases set out in subsection (1) of the said section 8A.

5.9 Audit

A question of great importance is the audit of the accounts of the public and statutory corporations. The accounts of the public corporations in the United Kingdom are audited by professional auditors appointed by the responsible Minister and not by the Comptroller and Auditor-General, who is responsible for the auditing of the accounts of Government departments. In Tanzania, there is a special body for carrying out the audit of public corporations, known as the Tanzania Audit Corporation, which was set up by a separate Act of Parliament (T.A.C. Act, 1968, No.1) to provide auditing, accounting and advisory services for the said institutions and for certain national companies in which the Government owns shares.¹¹³ The Public Corporations Act, 1969, in section 7(2) provides that subject to any written law, the accounts of every public corporation is to be audited by the Tanzania Audit Corporation or by such other person as the President may direct. The Audit Corporation is to perform its functions in accordance with the best professional standards and the board of directors is to give effect to any direction as to the exercise of the functions of the Corporation given, after consultation with it, only by the Comptroller and Auditor-General. The Tanzania Audit Corporation Act, 1968, also provides that if the President fails to lay the annual report and accounts of the Audit

113. See J.S. Read: "Tanzania", Annual Survey of African Law, 1968, page 136.

Corporation before the National Assembly within the prescribed time, the Auditor-General must submit them himself to the Speaker who, in turn, must lay them before the Assembly.¹¹⁴ It is of interest to note that the accounts of the Corporation will be audited by the Comptroller and Auditor-General.¹¹⁵ This provision has enhanced the power of control of the Auditor-General over the Audit Corporation.

But the accounts of the Bank of Tanzania¹¹⁶ and the National Bank of Commerce¹¹⁷ are to be audited annually by auditors appointed by the Minister. The Bank of Tanzania Act, 1967, also lays down that the Minister may, at any time, require the Comptroller and Auditor-General or such other auditor as he may appoint, to make an examination of, and to report on, the accounts of the Bank.¹¹⁸

The Tanzania Investment Bank Act, 1970, provides that the accounts of the Bank in respect of each financial year are to be audited by the Tanzania Audit Corporation.¹¹⁹ An identical provision exists

114. S.9(4).

115. For a discussion, see Bradley & McAuslan: "Public Corporations in East Africa", Government Enterprise, Friedmann & Garner (Ed.) page 294.

116. S.17(3), B.O.T. Act, 1967.

117. S.7(2), N.B.C. Act, 1967.

118. S.17(4).

119. S.23(1).

in the Tanzania Rural Development Bank Act, 1971.¹²⁰

In addition to the power entrusted to the Audit Corporation to audit the accounts of the public and statutory corporations, the Corporation can also now be directed by the President to conduct a special audit inspection of any specialised authority, or with regard to any person employed by a specialised authority or reasonably suspected of having had any dealing with a specified authority.¹²¹ This provision, undoubtedly, has increased the importance and the scope of activities of the Audit Corporation.

120. S.23(1).

121. The Tanzania Audit Corporation (Amendment) Act, 1970.

5.10 Parliamentary Control

Parliament exercises direct and indirect control over public and statutory corporations. Direct control includes powers which are exercised by Parliament itself. Indirect control is exercised through a Minister responsible to Parliament. We have already considered the question of Ministerial control under the several heads, namely, composition, appointment and removal of members of the board, directions, financial and audit control. We must now consider the accountability of the Corporations to Parliament. This must depend on the availability of published information supplemented by parliamentary questions addressed to the Minister concerned. The methods, usually applied for the exercise of direct parliamentary control over corporations include questions, debates, discussion of reports and accounts, etc.

(a) Parliamentary questions

Of all parliamentary techniques, the most widely known and the most commonly used is the parliamentary question. Any member of parliament is entitled to ask any questions regarding the affairs of any corporation. This source of information, however, yields little since questions relating to the internal organisations and the day-to-day administration cannot be asked. Therefore, parliamentary questioning has been regarded as an unsuitable device for the purpose of ensuring public accountability, but it can have a

desirable moral influence on the managers of public and statutory corporations. Since any major aspect of their conduct is liable to form the subject matter of a question, they develop a high sense of responsibility in the taking of decisions.

(b) Debates

Members of Parliament get many opportunities for debating matters affecting corporations in the course of the parliamentary programme. For example, when a Bill is presented before the House to amend existing legislation, or when the President or the Minister makes an order under the Public Corporations Act, 1969, to establish a corporation, and a copy of such order is laid before the National Assembly, or a specific Bill is laid before Parliament to set up a statutory corporation, the Members of Parliament can discuss the pros and cons of the provisions of the Bills and put forward their arguments for and against those provisions. ¹²²

Another occasion for Members of Parliament to debate is when the annual statement, otherwise known as the Budget, which is a statement of the estimates of income and expenditure for the coming year, is presented before the House. From the time it is presented until the time the Appropriations and Finance Bills are passed, Members get opportunities to discuss the financial policies pursued by the Government, and the relative merit of

122. For a full discussion, see Bradley & McAuslan: *supra*, page 284, and V.N. Carvalho: "Control of Managing Agents", EALR, Vol.5, 1972, pages 104-105.

allocation of funds to different Ministries.

The effectiveness of this device is very doubtful, because the Government may not be willing to accept the views expressed by Members of Parliament.

(c) Discussion of reports and accounts

Another opportunity for the exercise of direct control by Parliament is provided by the Presidential Orders or Statutes establishing public or statutory corporations. They are usually required to submit annual reports to the National Assembly, together with their accounts duly audited by auditors. The Public Corporations Act, 1969, provides that:

As soon as the accounts of a public corporation shall be audited, the Board of Directors or any person entrusted with the management of the Corporation shall send a copy of the statement of account together with a copy of any report made by the Auditors to the Minister designated by the President and such Minister will lay a copy of such statement of account and report before the National Assembly.

Similar provisions appear in the Bank of Tanzania Act, 1967,^{122a} and the National Bank of Commerce Act, 1967.¹²³

122a. S.18(1)(b) & (2).

123. S.7(3) & (4).

The Tanzania Investment Act, 1970, and the Tanzania Rural Development Act, 1971, do not contain a provision for laying a copy of the statement of accounts and auditor's report before the National Assembly. It is difficult to appreciate this.

However, these reports do not completely meet the needs of Parliament, partly due to their sheer volume and complexity, and partly because information is not necessarily available on matters on which it is required or when it is required. For example, the Annual Report of the National Development Corporation (1971-72), which has been scarcely impressive. It is actually a bare statement of profit and loss. It would be useful if the Boards are asked to produce comprehensive reports to acquaint the public and the M.P.s with as much impartial information and account of their doings as possible.

We have mentioned above the techniques which are available to the Members of Parliament to exercise control over the public enterprises. It depends entirely on the individual judgment and willingness of the Members of Parliament to make use of them. However, our study is unable to provide any example of parliamentary discussion because debates in the National Assembly are conducted in the Swahili language. We had to rely on the secondary sources, i.e. newspapers, periodicals, etc., and even then the examples are very rare. One such case was

reported in the 'Daily News' , 23 June, 1976. In answering a question asked by the M.P. for Musnna Rural, Ndugu H.K.D. Kirgint, the Minister for Finance and Industry, said that the Tanzania Rural Development Bank has issued loans amounting to shs. 591 m/- for development projects since its inception in 1971. The Minister also told the House that there was need for the Bank to recruit more personnel to effectively spread its activities throughout the country.

The question now remains how effective parliamentary discussion is in a one-party State. Usually, but not always, the Members of the Opposition Party or Parties raise questions in Parliament relating to the proper functioning of the public enterprises. One would assume that in a one-party State, the Party, the Government and the Government machinery mean the same thing. Therefore, the Members of Parliament's functions would be effectively performed by Government machineries. In the case of Tanzania, this is done by the three institutions, namely, the Audit Corporation (discussed earlier), the Standing Committee on Parastatal organisation, and the Inspectorate set up by the Parastatal Organisation (Finance Supervision and Control) Act, 1975.

The Standing Committee on Parastatal Organisations exercises a considerable control over the public enterprises. It is initially entrusted with the job of seeing that the public funds are properly used and uniform

pattern in respect of wage structure and fringe benefits is followed for all parastatal employees. Its powers and scope have been widened. The SCOPO has been reorganised ¹²⁴ to ensure efficiency. Under the new set-up, Ndugu S.J. Galinoma, has been appointed Permanent Chairman and Ndugu L.L. Mitalo, Executive Secretary (who was an Inspector in the Ministry of Finance). According to a circular issued by the Chairman to all parastatal heads, the SCOPO is now empowered to approve the organisational structure of all parastatals to ensure that the structure conforms with the needs and obligations of the respective parastatals. The SCOPO will ensure that the number of workers in a parastatal conform with its manpower requirements and that there is no overlapping between parastatals and companies. The SCOPO will continue to work out parastatal salary scales and fringe benefits to ensure that they do not exceed those given in the Civil Service. It will continue to supervise the transfer of Civil Servants to parastatals and ensure that they are mobilised accordingly.

However, the N.D.C. complain that the job descriptions and salary grades, as determined by the SCOPO, were too rigid to encourage individual responsibility and productivity. The Chairman, Ndugu N. Galinoma replied that:

124. The Daily News (Tanzania), 1 September, 1976.

on job descriptions, these were done on individual basis, taking into consideration the performance and importance of the companies. He thinks that there is need to see the NDC officials and study their case after which the SCOPO will issue a full statement with regard to these issues.¹²⁵

It is too early to expect a statement.

A new body (i.e. the Inspectorate) has been formed in accordance with the Parastatal Organisations (Finance, Supervision and Control), Act, 1975. The Functions of the Inspectorate will be:-¹²⁶

- (i) To examine the expenditure of parastatal funds by the various parastatal organisations and their employees.
- (ii) to investigate the conduct and performance of officers who control or have access to the funds.
- (iii) To review the financial regulations and propose amendments to them.
- (iv) To make recommendations and submit proposals to the Minister for ways and means of minimising unproductive expenditure of the funds.
- (v) To undertake such other enquiry and perform such other functions as the Minister may direct.

125. The Daily News (Tanzania), 7 December, 1977.

126. Ibid., 11 November, 1975.

The Inspector will be given access to all accounts, records of financial transactions and other documents appertaining to such funds or property.

We have not come across any report as yet. However, we believe if these institutions work effectively, they can exercise a good deal of control over the parastatal^{al} organisations on behalf of the Members of Parliament, the Government and the people.

It is of interest to note that Section 67(4) of the Interim Constitution of 1965 has also empowered the Commission of Enquiry to deal with the cases of misconduct and misuse of powers, whether it be a person or corporate bodies established by statute and public authorities or boards. But it is relevant to mention that no statute has made a specific provision regarding this.

However,

the Tanzanian Presidential Commission of Inquiry on the Co-operatives and Marketing Boards noted that ministerial pressure on the Development and Credit Banks had resulted in those bodies making some loans of doubtful soundness; it recommended that the Government should revert to its original and statutory role in relation to the banks of vetoing proposals only. 127

127. Bradley & McAuslan: "Public Corporations in East Africa", in Government Enterprise, Friedmann & Garner (Ed.), page 280.

It is appropriate to mention that the Commission of Enquiry have investigated "2,814 complaints up to June 1970. Out of 2,814 cases, 1,005 cases have been completed, and so far 372 were successful and 633 were not".¹²⁸ These figures speak for themselves that the people are taking advantage of this institution and that the Commission itself is very active and doing a real service to the nation as a whole.

128. M. Kimicha: "The Ombudsman and the Permanent Commission Enquiry", in the Journal of Administration Overseas, January, 1973, page 48.

5.11 Position of Members of Parliament and Government Officials

As regards the participation of Members of Parliament in the board of corporations, almost all statutes and orders are silent on this matter, with the exception of the Bank of Tanzania Act, 1967, which provides that M.P.s are disqualified from appointment to the board of the Bank. It can be argued that the appointment of an M.P. to the board will lead to overlapping of his functions, i.e. as the representative of the people, it is expected that he should raise questions and seek information on the affairs of the Corporation in the public interest, and as a member of the board he is supposed to support and defend the policy of the Corporation. One may find these tasks difficult to reconcile. But Bradley and McAuslan are of the opinion that so far as Corporations retain some autonomy and until the East African Parliament develop new techniques of calling corporations to account, the position of the M.P./board member is potentially valuable as a link between Parliament, the Corporation and the Public.¹²⁹

However, there is no restriction imposed on the Ministers or departmental secretaries to serve on the boards of parastatals.

129. Bradley & McAuslan: "Public Corporations in East Africa", op.cit., page 291.

It can be seen from the table ¹³⁰ below that the boards of Tanzanian parastatals are dominated by the Government officials.

Ministry	Parastatal Posts held on 22 April, 1972		
	Directorships or Representatives	Chairmanship	Total
1. Central Establishment (Mr. D.A. Mwakosya)	13	3	16
2. Commerce (Mr. O.M. Katikaza)	17	10	27
3. Treasury (Mr. C.D. Msuya)	24	-	24
4. Natural Resources (Mr. G.J. Kileo)	6	2	8
5. Rural Development (Mr. A. Mushi)	6	-	6
6. Lands (Mr. E.P. Mwaluko)	8	-	8
7. Devplan (Mr. E.A. Mulokozi)	8	10	18
8. Education (Mr. J.D. Maganga)	1	1	2
9. Comworks (Mr. I.A. Kaduma)	6	-	6
	89	26	115

^{P. 89}
130. Shivji: Class Struggles in Tanzania (1976).

Thus, 9 principal Secretaries shared among themselves 89 directorships and 26 Chairmanships, in all 115 top posts in the parastatals. On average, therefore, each one of them had 13 leadership posts in the parastatals.

Shivji states: "These links considerably minimize the internal contradictions between those running the State and those running the economy".¹³¹ This statement is true but the success of the domination as a whole surely depends on the confidence the above officials create in the departments and on the efficiency with which they combine administrative ability and business acumen. Such Government appointments to the boards of parastatals can only be supported on the ground that there is an acute shortage of qualified, skilled and educated people in Tanzania. It cannot be denied, however, that there will be an overlap of secretarial and directorial functions, which will also deter 'new blood' from getting into these institutions with their new ideas, initiative, drive and enterprise.

131. Shivji, I: Class Struggles in Tanzania, page 90.

5.12 Legal Status

In Tanzania, statutes and the Presidential orders bring into existence the statutory and public corporations respectively. They provide for its constitution, functions and powers. It is a body corporate with a common seal. As to its legal personality, every statute-creating corporation provides that the corporation shall:-

- (a) have perpetual succession and a common seal;
- (b) in its corporate name be capable of suing and being sued;
- (c) subject to this Act, be capable of purchasing and otherwise acquiring, and of alienating any movable or immovable property.¹³²

The public corporations established under the authority of the Public Corporation Act, 1969, are also endowed with the above powers.¹³³

The Corporation, therefore, is a separate legal entity different from the individuals who compose it. It is like a company or a natural person and is eligible to carry on such activities which lie within its powers, and is subject to the ordinary law of the land. The Corporation can exercise its rights and powers given to it by the statute creating it. A detailed discussion of the legal position of the Corporation can only be attempted

132. S.3, B.O.T. Act, 1967; S.4, N.B.C. Act, 1967; S.4, T.I.B. Act, 1970; S.4, T.R.D.B. Act, 1971.

133. S.2.

when the Courts of Law have considered the scope of the powers, privileges and immunities granted to it in a few cases.

Corporations are legal entities and they are subject to the ordinary law of the land. Now the question remains whether the corporations are subject to the ultra-vires doctrine.

The application of this doctrine and its implications in the case of the public enterprises in Tanzania has been fully explained by Professor R.W. James and S. Litunya.¹³⁴ The argument against the application of this doctrine is that it does not serve any useful purpose. On the contrary, it does dampen down the drive and initiative of the management. The problem usually arises when the activities of different corporations are very closely connected with each other, i.e. the functions of N.D.C., S.T.C. and N.A.F.C. sometimes overlap, and managerial decision is called for. In this situation, it is the responsibility of the individual corporation to confine its activities strictly within its bounds. If it exceeds its limit, then the action can only be supported on the ground that it has done so in the public interest. But the danger is that similar actions could also be taken by other corporations in the national interest and this would lead to duplication. In these circumstances, if the doctrine of ultra-vires is invoked in order to

134. "Organizational Relationships and Control", in East African Law Review, Vol.5, 1972, pages 39-64.

find out the offender, then the action which was taken by the defendant corporation in the public interest could in principle, be declared null and void.

The supporters of the doctrine claim that such a problem of duplication can be solved by the use of Ministerial directions. But the fact of the matter is that the use of direction is usually applied in respect of the general policy matters. It is expected that the Minister will refrain from interfering in the day-to-day administration. A conflict, however, might arise between corporations with regard to the day-to-day administration and the relevant Ministers may be asked to suggest a remedy. At this point, the Ministers, obviously, will consult the object-clause of the corporations concerned and try to look for the ultra-vires action in order to find out the corporation at fault. Therefore, the usefulness of this doctrine cannot be overemphasised.

Professor James and S. Ligunya also maintained that the ultra-vires principle as an element of control enhances a priori controls over a posteriori ones.

The former are statutes and regulations defining the powers of the Corporations, the method of appointing the members of the board, and the machinery for prior approval for certain well-defined transactions etc. The latter include the manner and degree of supervision exercised by the Ministry, the President and Parliament. 135

They are of the opinion that the shortcomings of the control mechanism in Tanzania is the prominence of the export controls over a priori ones.¹³⁶

The next relevant legal question to be answered is whether a corporation can claim sovereign immunity, on the ground that it is owned by the Government and run by the people appointed by the Government, and hence, it is an integral part of the Government, in a legal suit. The law is not very clear in this respect in Tanzania, as no definite legal principle has been established by the Courts. However, the decision in the case of Trendtex Trading Corporation v. Central Bank of Nigeria,¹³⁷ will be instructive because a similar situation might arise there in the near future. The facts of the case are as follows:

In July, 1975, there were 300 to 400 ships waiting on demurrage outside the port of Lagos - Apapa - for berths that were all occupied. More ships were arriving daily. Most of them were carrying cement. The Government departments had ordered far too much cement. The ports were utterly unable to cope with it. In the same month, a new military administration took over the government machinery. It suspended the import of cement into Nigeria. It set up a Committee to negotiate fresh terms with the suppliers so as to reduce the quantities on order and to spread the deliveries over a longer time. The steps taken had proved successful. The

136. Op.cit., ibid.

137. Reported In The Times, 18 January, 1977.

congestion of ships had been cleared.

The Central Bank of Nigeria originally issued a letter of credit for more than \$14m and it had expressly stated that no confirmation of the credit was necessary, that they were "irrevocably committed to honour" their engagements under the credit. The credit had been transferred to Trendtex Trading Corporation who made shipments of cement to Lagos for some of which they had not been paid. In November, 1975, Trendtex issued a writ in the High Court against the Bank claiming demurrage on six ships, the price of cement shipped on two, and damages for non-acceptance.

Mr. Justice Mocatta had ordered the Bank to retain \$14m in London to meet the claim. Mr. Justice Donaldson had set aside the writ and statement of claim against the defendants, the Central Bank of Nigeria, on the ground that the Bank was a department of State and, therefore, was immune from suit.¹³⁸

The Court of Appeal allowed an appeal by the plaintiffs, Trendtex Trading Corporation of Zurich, against Mr. Justice Donaldson's order. It was held on appeal, reversing the judgment of Mr. Justice Donaldson, that the Central Bank of Nigeria is not to be regarded as a department of the Government of Nigeria in the guise of a bank so as to be immune from

138. [1976] 1 WLR 868.

suit under the doctrine of sovereign immunity.

Lord Denning, Master of the Rolls, said that:

a century ago no sovereign state engaged in commercial activities. It kept to the traditional function of a sovereign: to maintain law and order, to conduct foreign affairs and to see to the defence of the country. So England, like most other countries, adopted the rule of absolute immunity. Now nearly every State engaged in commercial activities. It had its department of State or it created new legal entities which went into the world's market places ... If a Government went into the market places of the world to buy cement as a commercial transaction it should be subject to the laws of the market place.

His Lordship preferred to rest his decision on the ground that there was no immunity in respect of a commercial transaction even for a Government department. The two other Judges, Lord Justice Stephenson and Lord Justice Shaw, also agreed.

The above case was entertained and decided by a foreign Court. But our purpose is to establish the legal status of corporations in their country of origin. In Tanzania, all corporations have corporate personality and, therefore, can sue and be sued in the Courts in their respective names.

However, it is expected that in a legal proceeding which may be brought by the Corporations or against the Corporations, they would not enjoy any special privileges, for example, sovereign immunity, exemption from tax liability, etc., in the absence of any established legal principle in this regard.

5.13 Dissolution

An interesting feature of the Tanzanian Corporations is the power of the President in the matter of dissolution and merger of the Corporation. Section 8(1) of the Public Corporations Act, 1969, provides for a merger or dissolution in the following terms:

(1) Where the President has established or establishes a public corporation, or any statutory corporation has been established, for the performance of any functions and the President is satisfied that there exists any other public corporation or statutory corporation (hereinafter referred to as 'the existing corporation') for the performance of all or any of the functions for which such public corporation or statutory corporation is or has been established, the President may -

(a) by order in the Gazette provide that the existing corporation shall cease to exist or shall cease to perform all or any of the functions which are conferred upon the public corporation or the statutory corporation as the case may be;

(b) by order transfer any asset or liability of the existing corporation to the public corporation or statutory corporation, as the case may be;

(c) by order transfer any person who is an employee of the existing corporation to the service of the public corporation or the statutory corporation, as the case may be.

Our study reveals that the President has exercised the power to dissolve certain corporations in 1971, for example, the National Development Credit Agency (Winding-up) Order, 1971,¹³⁹ and The College of Agriculture (Dissolution) Order, 1971,¹⁴⁰

139. GN No. 112, published on 30.4.1971.

140. GN No.120, published on 21.5.1971.

CHAPTER 6

LEGAL ASPECTS OF PUBLIC ENTERPRISE IN INDIA AND TANZANIA:

A COMPARATIVE STUDY

GOVERNMENT COMPANIES IN INDIA AND TANZANIA

- 6.1 Government Companies in General
- 6.2 Government Companies in India
- 6.3 Nature and Composition of Governing Boards
- 6.4 Public Accountability
 - (i) Ministerial and Presidential Control
 - (ii) Audit Control
 - (iii) Parliamentary Control
 - (iv) Judicial Control
- 6.5 Legal Status
- 6.6 Government Companies in Tanzania

6.1 Government Companies

The third type of public enterprise is the Government Companies. Like private companies, they are governed by the provisions of the Companies Act and have the common basic structure of companies with their memorandum of association,¹ articles of association,² annual general meetings, boards of directors, and share capital. They come into existence either by fulfilling certain statutory requirements as laid down in the Companies Act or by acquisition of shares, compulsorily or by agreements, in an existing company.

The Government company is one in which the Government has a controlling interest through its ownership of all or some of the shares. It may be wholly owned by the Government or a mixed enterprise, i.e. partly owned by the Government and partly by the private individuals.

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1. The Memorandum of Association, as is well-known, is by far the most important document relating to the Company because in it are set out things which the Company is to have power to do. It is signed by the persons forming the Company.
 2. The Articles of Association control the internal management of the Company and deal with such matters as voting rights, powers of the directors, appointment of auditors, etc.

"The term 'mixed enterprise', says Professor T. Daintith,³

may be used to describe an enterprise, a substantial part of whose capital is privately subscribed, which is constituted as a company subject to the Companies Acts or is otherwise endowed with corporate status, in which the Government itself, a public corporation, or a local authority has a substantial financial interest of a permanent character, coupled with the ability to exercise a measure of internal control either by way of voting power conferred by the ownership of shares or by the possession of a right to nominate directors or both.

In the United Kingdom, public corporation has been accepted as a vital instrument of Government policy, but even then the participation of the Government through commercial companies is not unknown. Between 1964-70, the two Labour Governments implemented a variety of economic and industrial policies which were directed at the private sector of industry. The Industrial Reorganisation Corporation was established under the Industrial Reorganisation Act, 1966, with a view "to promoting industrial efficiency and profitability", and to assist the economy of the United Kingdom, the Industrial Reorganisation Corporation was to promote or assist the reorganisation or

3. T.N. Daintith: Government Enterprise, W. Friedmann (Ed.), "Mixed Enterprise in the United Kingdom", page 56.

development of any industry.⁴ Its powers were backed up by the 1968 Industrial Expansion Act, which extended Government powers to the production and marketing activities of firms by the investment of funds through the purchase of shares. By 1970, the Government had purchased millions of pounds' worth of shares of different commercial companies and made their presence felt. But in 1971, the Conservative Government had terminated the Industrial Reorganisation Corporation. The Labour Government's desire to take active participation in the industrial management did not, however, die down. In 1975, the Industry Act was passed. Part I of the Act is concerned with the establishment and constitution of the National Enterprise Board. This is modelled broadly on the same line as the Industrial Reorganisation Corporation. In general terms, the functions of the Board are as follows:⁵

- (1) To foster a higher level of investment in British manufacturing industry. The conventional wisdom at the present time holds that industrial troubles stem from a failure on the part of private enterprise to invest sufficiently. The National Enterprise Board is endowed with public funds amounting to £700m.

4. S.21(1), I.R.C. Act, 1966.

5. N. Branton: "The Industry Act, 1975", Accountants Review, (April), page 17.

- (2) To obtain for the State a stake in the more profitable sections of industry.
- (3) To assist firms or industries which may be in difficulties but which are thought to have good prospects of a prosperous existence in the future.
- (4) At the instigation of the Government, to come to the aid of "lame ducks" which it is considered essential to save "in the national interest".

One of the criticisms levelled against the National Enterprise Board is that it is an instrument for "backdoor nationalization".

However, several examples involving Government interest in private enterprise firms had resulted in the late 1960s from the activities of the Industrial Reorganisation Corporation, for example, B.P. Oil Company, the British Sugar Corporation, International Computers Limited, etc. The Nationalised Industries also were involved in mixed enterprise, as in the case of B.O.A.C. (now B.A.). Minority interests in several airlines which served as feeders for its main routes, the case of the Gas Council, which held a 50% share in British Methane,, and the British Steel Corporation, which had holdings exceeding 10% in fifty-four subsidiary companies.⁶

6. W.A. Robson: Mixed Enterprise, N.W.B. & R., August (1972), page 7.

During the first year the N.E.B. has made equity investment in five companies in the fields which range from the paper industry (Reed and Smith) to the machine tool industry (Agemaspark). The percentage of voting shares and the investment in these companies are as follows:

"	<u>% Voting Shares</u>	<u>Total Investment</u>
(1) Data Recording Instrument	54.0	£2.40m
(2) Agemaspark	30.0	£0.41m
(3) Twinlock	33.3	£1.00m
(4) Reed & Smith	29.8	£0.80m
(5) Sinclair Radionics	42.9	£0.65m " 7

In addition, the N.E.B. also became involved in lending cash to machine tool companies on a commercial basis at rates slightly in excess of the 13 per cent. In 1976, it made a pre-tax profit of £51m on a group turnover of £2.75 billion, giving the N.E.B. a before-tax rate of return of 11.8 per cent on the average capital employed during the year.⁸

It remains to be seen whether the N.E.B.'s involvement in industry is likely to secure the present Government economic objectives.

Apart from numerous cases in which the Government is a shareholder in public limited companies, there are cases in which such companies are owned and controlled by the Government, as with Remploy Ltd., Cable

7. J.E. Abbott: "The Nationalization of Enterprise", in the Accountants Record, February, 1978, pages 16-19.

8. *Ibid.*

and Wireless Ltd., Beagle Aircraft Ltd., and the National Seed Development Organization Ltd.⁹

It is the mixed enterprise that provides the most obvious justification for the use of the company rather than the public corporation.¹⁰ The recent trend, however, indicates that the present Labour Government is extremely keen to participate in the economic and industrial development directly through this institution. The "mixed company", says Professor W. Friedmann, has thus become a respectable and deliberate instrument of State economic involvement in Britain.¹¹

At the Rangoon Seminar on:

some problems in the Organisation and Administration of Public Enterprises in the Industrial field, organised by the United Nations, it appeared to be the unanimous opinion of the consultant that where an enterprise is wholly Government-owned it should be set up in the form of public corporation, or in some administered as a department of Government. 12

9. Turvey (Ed.): Public Enterprise (1962), Chapter 21.

10. A.H. Hanson: Public Enterprise & Economic Development, (1959), page 351.

11. W. Friedmann (Ed.): Government Enterprise (1970), page 312.

12. *Ibid.*, page 13.

The Rangoon Seminar recognised the difference between a mixed enterprise and a wholly-owned State company, but considered the latter to be frauds.

In support of its view, it remarked:

Among the main disadvantages of this device in the case of entirely State-owned enterprises are the following:

(i) The Company device evades the constitutional responsibilities which a State-controlled enterprise has, in a democratic society, to the Government and to Parliament.

(ii) The use of the Company form and of the law relating commercial companies usually becomes a mere fiction because all or most of the functions normally vested in the shareholders and in the management are reserved to the Government by the statute setting up the company. There is usually no meeting of shareholders because it would be meaningless, and the profits as well as appointments to the Board are naturally reserved to the Government. 13

Professor W.A. Robson has also expressed his view in very strong words against this form of Government participation. He said that: "Its corporate nature is often fictitious, since the ownership is usually vested in

13. Ibid., pages 13-14.

the Crown or in the Government. It is no way an instrument of democratic socialism, but is rather a device for avoiding public accountability and controls".¹⁴ Nevertheless, the Company form has come to be recognised as an important instrument of the public sector in India, and the creation of a company at present is the rule rather than an exception. There are altogether 604¹⁵ Government Companies in India. This figure speaks for itself, as to its recognition and popularity.

14. W.A. Robson: Nationalized Industry and Public Ownership (1962), page 28.

15. Reported in the Amrita Bazar Patrika, 18 April, 1976.

6.2 Government Companies in India

The Indian Companies Act, 1956, contains a set of provisions designed to apply specially to Government Companies.¹⁶ A Government Company has been defined by section 617 of the Companies Act, 1956, as one

in which not less than fifty-one percent of the paid-up share capital is held by the Central Government, or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments and includes a Company which is a subsidiary of a Government Company as thus defined.

It is appropriate to mention that the definition excludes the participation by the Public Corporations.

It must be noted, however, that 'Government Company' is not a separate class by itself. A public company as well as a private company may be a Government Company. Most of the Government Companies in India have taken the form of private companies,¹⁷ where only two share-

16. SS. 617, 618, 619, 619A, 620, 620A.

17. Other distinguishing features are (i) the number of shareholders cannot exceed fifty, (ii) the general public cannot be asked to subscribe, and (iii) shares are not freely transferrable.

holders are required to sign the Memorandum and Articles of Association. To comply with this formality, the instruments are signed by the President of India and the Secretary of the Ministry or Department concerned as shareholders.

Despite the Industrial Policy resolution of 1948,¹⁸ which declared that the management of State enterprises would, as a rule, be through the medium of public corporations, the company form has been preferred for executive convenience. The following reasons¹⁹ have influenced the Government to adopt the company form in preference to a statutory body. Firstly, it is easy to establish and the Government does not have to go to Parliament each time it wants new machinery for one of its new ventures. Secondly, it provides a great deal of flexibility and freedom of action in management. Since they are governed by the Companies Act as the private companies and constitutionally they are not part of the Government administration or of the Government finances, Parliament has no power to exercise any rights over this form of organisation. Thirdly, the articles of association can be altered by the Government without reference to Parliament. This means that the Government could reserve sufficient powers in its hands by making necessary provisions in the articles. Fourthly, this form of organisation is particularly suitable when foreign participation is essential because of the dearth

18. See supra.

19. S.S. Khera: Government in Business, pages 115-119.

of capital and technical knowhow.

Finally, the company-type organisation enjoys greater freedom to adjust salaries and conditions to market trends. This helps to employ people whose experience is a valuable asset to Government in business. Another purpose in establishing Government concerns in the company form may be to secure for them a certain amount of flexibility in administration. Thus, the normal rules and regulations in Government relating to, for example, recruitment policy, method of purchasing raw materials, etc., may not apply to the company form of organisation.

One threat might be that the Government in an opportune moment can change its mind and sell all or majority of shareholdings either to the general public or to a favoured class. If this happens, the whole exercise of State participation in the economy will be frustrated. When a question was raised in Parliament to that effect, the Government emphatically stated that it had no intention of doing so in any of the companies.²⁰

The Administrative Reforms Commission in its report on Public Sector Undertakings (1967) discussed the question of a suitable organisational pattern for public enterprises. Its recommendations were as follows:

20. Lok Sabha Debates, dated 9 March, 1973, Vol. XXIV, page 136.

- (1) The form of a statutory corporation should in general be adopted for public sector projects in industrial and manufacturing field.
- (2) For projects in which there is an element of private participation the Government Company form may be adopted.
- (3) Promotional and developmental agencies should, as far as possible, be run as statutory corporations or departmental concerns.
- (4) Undertakings which are predominantly trading concerns or which are set up to improve and stabilise particular areas of business²¹ may have the company form.

In answer to a starred question²² enquiring which of the Commission's recommendations the Government has accepted, it states^d as follows:

For certain enterprises providing public utilities which are primarily intended to develop the basic infrastructure facilities the statutory form of management may be preferable. For other enterprises including those operating in the monopolistic field, but where the commercial aspect is predominant, the present form of a company may allow more flexibility. Government therefore do not consider the

21. Report of the Administrative Reforms Commission on Public Sector Undertakings, (1967), page 14.

22. Starred Question No.97, dt. 21 February, 1969.

form of statutory corporation should
in general be adopted for public
enterprise.

The A.R.C. study team has rightly observed that:

the Government have kept the whole
question open while going invariably
for the company form. We feel that
Government have not yet laid down
a rational basis or a well defined
set of criteria for determining which
form would be suitable in different
areas of enterprise. 23

The observation made by Professor W.A. Robson in respect of Government
Companies seems to be true in the Indian context.

6.3 Nature and Composition of Governing Boards

The usual pattern of managing the affairs of a Government Company is to have a board of directors for the purpose. The board consists of both full-time and part-time members. All the members of the board are appointed by the Government, with the exception of companies which have outside participation; in these cases, outside participants have a right to nominate some directors in proportion to their capital contribution in the enterprise concerned. One of the members of the board is nominated by the Government as its Chairman. As no qualifications are laid down in the articles of association for appointment to the board of directors, the Government feels free to appoint any one it pleases. It is noticeable that there is invariably one representative each from the parent and Finance Ministries. In some cases, there may be more than these two officials.²⁴

The A.R.C. in its report in 1967 on public undertakings rightly stated that the presence of senior officials of the Ministry/Department on the board tends to take away its character as an autonomous body and imports into it the climate and character of a Government Committee. In this regard, the A.R.C. recommended that:

24. Appointment of M.P.s as directors has been discussed earlier.

- (1) If sufficiently experienced men are not available for holding the board membership, then suitable persons may be selected from among Government officers, leading industrialists, professional managers and specialists in the public sector. In such cases, persons selected should sever their connection with their previous organisations. In particular, Government officers selected for these posts should be asked to resign;
- (ii) Certain general qualifications should also be prescribed for the members of the board; and
- (iii) While appointing part-time official nominees to the board, the Government should see that persons nominated do not have to serve on more than two or three boards and are not so burdened with their substantive work that they find it difficult to play a²⁵ useful part in board meetings.

With regard to the recommendation (ii) above, the Government had this to say:

Any qualification that may be prescribed for appointment to the Boards of Directors will have to be in general terms, and it may not be possible to lay down such qualifications in precise terms. The Chair-

25. A.R.C. Report on Public Sector Undertakings, (1967), page 39.

man of the Board will be appointed by Government and the members of the Board appointed by Government in consultation with the Chairman. ²⁶

The rejection of this recommendation is invariably influenced by the fact that if it is accepted, this would restrict the scope of patronage generally exercised by the Government in appointing members to the boards.

The other decisions on the A.R.C. recommendations are as follows:

- (1) As a normal rule, there should be full-time Chairman-cum-Managing Director. However, there might be exceptions where the Chairman might be only a part-time one. In such cases, there should be a full-time Managing Director. Even where the Chairman is part-time, he should take on the full responsibilities and should be invested with the full authority. There should, however, be no diffusion of authority as between the Chairman and the Managing Director.
- (11) As a rule, no officer of a Ministry should be made Chairman of a public undertaking, nor should the Secretary of a Ministry be included in its Board of Management. ²⁷

26. A Hand Book of Information on Public Enterprises, (1970), Delhi, (Ministry of Finance), page 139.

27. *Ibid.*, page 139.

The Government has also agreed that in the larger units, full-time functional directors may be appointed, who will be executive heads of their departments, and recognised that there should be suitable decentralisation of powers, not only between Government and the board of directors but within the undertaking itself.²⁸

The Government has further agreed that in the boards of directors, not more than two Government representatives (i.e. who have ordinary secretariat duties) should ordinarily be appointed; but in exceptional cases, and for good reasons, the number may be exceeded. It has also been decided that Government representatives should be on the board by virtue of their office. No Government official should normally serve as part-time director on more than two Boards.²⁹

With regard to the representation of outside members on the boards of management, the government decided that there should be two or three part-time members on the Board from outside the Government. As regards their qualifications, the Government stated that it would be difficult to lay down any precise qualifications in the relevant Statutes or Articles of Association.³⁰

28. Ibid.

29. Ibid., page 140, ARC Rec. 4(1)(c), 12(3) to 46(6).

30. Ibid., ARC Rec. 4.

It is relevant to mention that the Krishna Menon Committee³¹ in 1961, made similar recommendations and the Government then agreed³² that an officer having ordinary secretariat duties would not be appointed a director in more than three or four undertakings; one representative each from the controlling and the Finance Ministries would be appointed as a director; no Secretary of a Ministry would be appointed as a director; no Member of Parliament would be appointed as a director; persons having business connections may be appointed as part-time, but not as full-time, directors provided there is no clash of interest.

But unfortunately, the decision had not been carried out in practice. In 1963-64, the Estimates Committee in its report has brought to light that many public undertakings had appointed Secretaries and additional Secretaries as directors on a part-time basis, and that certain officers continued to be on the boards of as many as eight undertakings and that the boards were generally dominated by the official element.³³ Again in 1967, the Study Team of the Administrative Reforms Commission had discovered that, on the whole, seventy per cent of the directorships of the Government

31. Discussed earlier.

32. Government decisions on the Committee's recommendations, Lok Sabha Debates, 20 November, 1961, App.1, Annex.3, 4-6.

33. Estimates Committee, 52nd Report (III L.S.) 6.11.87 (1963-64).

Companies were held by Civil Servants on a part-time basis.

A recent study of the Department of Economic Affairs revealed that in the 53 companies, where the strength of the board varied from 5 to 15, out of the 367 directors, 263 were Government officials (but not Secretaries and additional Secretaries), thus constituting on the average, nearly two-thirds of the membership of the board.³⁴ The rest were non-officials.

Some of the big companies with predominant official majority are : the Hindustan Cables Ltd. (10 out of 11), the Heavy Engineering Corporation Ltd. (8 out of 9), and the Indian Rare Earths (6 out of 7).³⁵

However, since the acceptance of the recommendations of the Administrative Reforms Commission, there is no evidence to suggest that the decisions have been bypassed.

The purpose of this study will be far from complete if we do not discuss by way of example the objects, constitution, board of directors, functions, etc. of a typical Government company. To fulfil this, we take the case of the State Trading Corporation.

34. B.P. Mathur: Public Enterprises in Perspective (1977), Delhi, page 220. (The author did not mention when the report was published).

35. Ibid.

The State Trading Corporation is a company incorporated under the Companies Act, and was set up in May, 1956, with an authorised capital of Rs.1 crore divided into 100,000 equity shares of Rs.100 each. The paid-up capital was initially Rs.5 lakhs, but it was raised to Rs.10 lakhs in October, 1956, and to Rs. 1 crore in 1957. The paid-up capital has been increased a number of times since then, and in 1973-74, it stood at Rs.10 crores.³⁶ It is, however, appropriate to mention the purpose and need to create such an institution.

Since Independence, the Government has given a great deal of thought to the question of State trading in commodities. The subject of State trading was examined by two Committees appointed by the Government. The first Committee, with Dr. P.S. Deshmukh as Chairman was appointed in 1949. The Committee suggested that the Government might entrust its trading functions in foodgrains and fertilizers to a statutory organisation which should be called the State Trading Corporation. The Deshmukh Committee also recommended the State Trading Corporation might take over all the import and export operations of a commercial nature which was then handled by different departments of the Government (i.e. the Ministry of Commerce and the Ministry of Agriculture). In addition, the Committee also recommended that the State Trading Corporation might take up the import of East African cotton and export of short-staple cotton and the products of cottage industries. The Committee was of the opinion that when

36. The 18th Annual Report on the Working and Administration of the Companies Act, 1956, page 129.

the commodity in question was suitable for state trading, then only the possibility of raising revenue for the State should be considered as an additional ground for resorting to State trading. The Committee, however, pointed out that in the case of luxury articles, the prices of which generally remain high, State trading could be resorted to for the purpose of raising additional revenue. The report was shelved because the Government did not want to upset the prevailing market system.

However, the second Committee, with Mr. S.V. Krishnamurthy Rao as Chairman, was appointed in 1952 to examine the question of State trading in commodities. The Committee came to the conclusions that in view of the altered conditions in the world market, it was necessary for a State Trading Corporation to take over import of foodgrains, cotton and fertilizers. The Committee, however, recommended the setting up of a State Trading Corporation for the export of handloom cloth and the products of small-scale and cottage industries. Thus, both the Committees were in favour of setting up a State Trading Corporation. Finally in May, 1956, the State Trading Corporation, an entirely State-owned organisation, was established.

The objectives of the Corporation, as set out in the Memorandum of Association are to "organise and effect exports and imports into India of such goods and commodities as the Company from time to time determine,

and to do all such other things as are incidental or conducive to the attainment of the above object." In practice, the management of the Corporation has :

having regard to the business already being transacted by other companies or organisations, endeavoured to seek out opportunities to make its contribution to the building up of the country's commerce with new markets and new sources of supply; to providing facilities to augment exports; to securing, wherever possible, improvements in terms of trade and economies in imports; and to arranging to the extent practicable for import and distribution of certain essential raw materials at stable prices.³⁷

The share capital was wholly subscribed by the Government of India. The shares were held in the names of the President of India and the joint Secretary of the Commerce Department. The President has been provided with special powers in the Articles of Association. These powers range from giving directives to the board of directors, to the appointment and dismissal of the members of the board at the absolute discretion of the President.

According to the First Annual Report, all eight Directors were Government officials. The Additional Secretary to the Ministry of Commerce was appointed as the Chairman. In August, 1959, an outsider was

37. The S.T.C., First Annual Report, November 16, 1957 (pages not numbered).

appointed as a full-time Chairman. But the Board was dominated by the Government officials, namely, the Financial Adviser representing the Ministry of Finance, another Joint Secretary in the Ministry of Commerce and Industry, a full-time employed officer of Government, who had retired as Finance Secretary and was continued in employment or reemployed for the specific purpose of serving on a number of boards of management of Government concerns, a Joint Secretary from the Ministry of Steel, Mines and Fuel, the Director of the Indian Bureau of Mines, the Director-General of Supplies and Disposals, and a Director of the Railway Board.³⁸

The situation is somewhat different at present. There are two Government officials, one representing the controlling Ministry (Ministry of Commerce and Industry), and the other representing the Ministry of Finance, are on the Board of Directors.

Although the State Trading Corporation functions under the supervision of the Government and its Directors appointed by the Government, it is not concerned with the performance of Governmental functions. So far as its functions are concerned, it cannot be considered as a department or an organ of the Government.

38. S.S. Khera: Government In Business, page 131.

The fact that the Minister appoints the members of the Corporation and is entitled to call for information and supervise the conduct of the business does not make the Corporation an agent of the Government, where, however, the Corporation is performing in substance governmental and not commercial functions an inference of agency is readily to be made. 39

It is relevant to mention the performance of the State Trading Corporation in the recent years. In 1968-69, the total sales of the Corporation stood at Rs. 167.2 crores, an increase of 18% over the previous year's level of Rs. 141.2 crores. Of this, 48.5 crores were accounted for by exports, Rs. 114.1 crores by imports, and the rest by internal trade. For the first time, salt was exported to East African countries, Urea formaldehyde powder to U.A.R., bleaching powder to Kenya, and Iraq, and manganese dioxide sludge to Austria. Consignments of roses, Indian mangoes and vegetables have been sent to the European countries and the United Kingdom. The gross profit for the year after deducting depreciation was Rs. 12.06 crores as against Rs. 5.84 crores in the previous year.⁴⁰

39. S.T.C. v. C.T.O., 1963, SC 1811.

40. A Hand Book of Information on Public Enterprises, page 229.

In 1969-70, the State Trading Corporation's gross profit stood at Rs.12.74 crores, but in 1970-71, the gross profit fell back to Rs.6.43 crores and it "was partly due to our large export losses this year and the constant demands for reducing prices and margins on our imports".⁴¹

41. Annual Report, 1970-71, page 9.

6.4 Public Accountability

There are four major types of public control: (i) Ministerial control, (ii) audit control, (iii) Parliamentary control, and (iv) judicial control.

(i) Ministerial and Presidential Control

The Indian Companies Act, 1956, does not make any specific provisions relating to Ministerial control of Government companies. In practice, this type of control is more effective and real because it is the responsibility of the Minister to set out the policy as well as to appoint the members of the board of directors including other top officials.

The following provisions are ordinarily to be found in the Articles of Association of Government Companies where the Government is the sole shareholder.⁴² All the directors are appointed and removable by the Government. The Chairman of the Board of Directors and the Managing Director are also appointed by it. The management of the company, subject to the control and supervision of the Board, lies in the hands of the Managing Director. The Managing Director may request the Chairman of the Board to reserve for the consideration of the Government certain

42. S.S. Khera: Government in Business, pages 283-383.

matters relating to the working of the Company,⁴³ for instance :-

- (a) Calling up unpaid capital or increasing the authorised capital of the Company or issuing of any unissued shares;
- (b) Any proposal to borrow beyond a certain limit or at a rate higher than the Bank rate;
- (c) Any proposal for the reduction of the capital;
- (d) Issue of debentures;
- (e) Acquisition, construction or sale of vessels;
- (f) Winding up of the Company;
- (g) Any important matter relating to the Company's establishment;
- (h) Any other matter which, in his opinion, involves an important issue of general policy.

In the case of Government public companies, i.e. where the majority of shares is held by the Government, the Government exercises its power in such a manner that only those directors who are acceptable to it have a chance of election. The Chairman of the Board of Directors is appointed on the recommendation of the Government. The Government has also the power to nominate a special director. He holds office during the pleasure of the Government. He enjoys certain special powers. A special director is entitled, as set out in Article 140 of the Asoka Hotels

43. O.M. Prakash: The Theory and Working of State Corporations, page 202.

Ltd. :

to cause a reference to be made to the President in writing by the Board with a view to secure the previous approval of the President in writing in regard to any important matter involving policy affecting the financial position of the Company, provided however that no action shall be taken by the Company in respect of any matter referred for the decision of the President as aforesaid until approval of the President to the same has been obtained in writing, provided further that if the President does not convey to the Board his decision on any such question as aforesaid within one month from the receipt of the reference to him or within such reasonably lesser time than such one month - as the exigencies of the case may require (such time being in no case less than two weeks from such receipt unless any director nominated by the President on the Board agrees otherwise in writing), the Board shall be at liberty to take its decision thereon. Provided lastly that the question as to what matters are not matters involving policy affecting the financial position of the Company for which a reference may be caused to be made as provided herein shall be decided between the President and the Company by mutual agreement and by exchange of letters in this behalf.

Further, he is not liable for retirement by rotation as per Article 119(3).

The Board of Directors shall take action on the matters when the views of the Government are known. This power of reference of a director caused

unnecessary delay in the working of a company, hence in 1961, the Government decided that the Chairman alone should have the power to reserve a proposal of the board of directors for Government approval and, accordingly, amended the articles of association of various undertakings.⁴⁴

The Government further decided that the following powers relating to financial matters may be exercised by the public enterprises:

- (a) the Board of Directors are authorised to sanction capital expenditure without prior reference to Government within specified limits (it varies from enterprise to enterprise and bears no relation to their operations) on works and schemes which comes within the approved objectives of the enterprises. The Boards are also fully authorised to sanction all capital expenditure in cases where the Detailed Project Reports have been approved by Government and also permit variations in the estimates of not more than 10 per cent for any particular component part.
- (b) It is not necessary for public enterprises to submit their revenue budgets for prior approval except in cases where Government is expected to make up the deficit, if any, in the budget. The revenue budgets, as approved by the Board of Directors have to be sent to Government only

44. Paranjape: "Note on Recent Developments in Public Enterprises", 10 I.C.J.P.A. (1964), page 535.

for information of production targets , probability, etc.

- (c) The public enterprises may approach financial institutions such as the I.F.C., the I.D.B. and the Unit Trust for financial assistance for expansion programme. 45

Mr. G.P. Yadav, a Member of Parliament, raised a question in Parliament covering all the matters mentioned above, with special reference to the Indian Tourism Development Corporation. The Minister of State in the Ministry of Finance stated that:

(a) In the case of public enterprises, the annual capital budgets of the enterprises have to be approved by the Finance Ministry and the funds required from Government voted by Parliament. The administrative Ministries can, thereafter, release funds on the basis of these approved budget provisions, except that, in the last quarter of the year, the release has to be with the approval of the Ministry of Finance. In the case of public enterprises, that have incurred cash losses, which have to be re-im-bursed, by Government, the revenue budgets have also to be approved by Government.

(b) All financial powers of the Corporation vest with the board of directors. The board of directors has complete powers , except the power to take major investment decisions, which is reserved by Government. In the

45. A Hand Book of Information on Public Enterprises (Ministry of Finance), 1970, page 150.

exercise of these powers, the board is advised by the Company's Chief Executive and its Financial Adviser. The board of directors, in turn, can delegate financial powers to appropriate subordinate authorities within the Company. The delegation is done by -

- (i) reserving matters which require the concurrence of the Financial Adviser;
- (ii) matters where consultation with Financial Adviser is necessary; and
- (iii) those on which he need not be consulted.

Control is also exercised through the Internal audit, statutory audit and the audit by the Comptroller and Auditor-General.

The India Tourism Development Corporation follows the general pattern of delegation of financial powers and financial control. The Corporation has a fully-fledged Finance Division whose chief assists the board of directors in the exercise of the Corporation's financial power.

(c) As stated above, all powers, including financial and administrative powers, vests with the board of directors and not with any single person. The board of directors may devise suitable delegation of powers for the proper functioning of its activities. As such, the question of vesting financial or administrative powers with any single individual or divorcing it from administrative control does not arise. 46

It is clear from the above statement that the project reports and revenue budgets are not presented to Parliament for discussion, but the Minister concerned is answerable to Parliament if a question relevant to them is raised. But it is significant that even if all companies are required to submit the projects reports and revenue budgets in Parliament, the Members of Parliament will hardly find any time to discuss them as there are 604 companies at present. However, Parliament must ensure that effective control is exercised by sectoral Ministers by its M.P.s raising questions from time to time.

Having delegated these financial matters to the board of directors, the Government has also asked the Reserve Bank of India to study the finances of the Government companies for the year ending March, 1971, in order to ensure that finances are properly raised and utilised.

In answer to a written question relating to the findings of the Study, the Government stated that:

- (i) Of the Companies studied, 93 were companies having a paid-up capital of less than Rs.20 crores each. These companies performed better as compared to the remaining 12 companies (each having a paid-up capital of Rs. 20 crores and above);
- (ii) Mining and quarrying companies, generally fared badly in comparison with engineering and chemical companies;

- (iii) Although the Companies (having a paid-up capital of Rs. cro20 crores and above) have lagged behind the Companies (having a paid-up capital of less than Rs. 20 crores) in improving their sales performance, in the overall operating results, the former type were able to reduce their overall net loss from Rs.26 crores in 1969-70 to Rs.24 crores in 1970-71, while the overall net loss of the latter type of companies increased from Rs. 11 crores to Rs.13 crores during the same period; and
- (iv) Internal sources contributed a minor portion to the financing of assets formation, both of the former and the latter companies. 47

The Government further added that it wishes to "keep a constant watch over the performance of the Central Government Industrial and commercial undertakings in order to take timely remedial action".⁴⁸ It has taken various measures to improve the working of these enterprises, which include steps:

- (i) to improve maintenance organisation and practices for reducing equipment downtime;
- (ii) better production, planning and control; and
- (iii) incentive schemes and training for better motivation and higher productivity, etc. 49

47. Lok Sabha Debates, 23 February, 1973, Vol.XXIII, pages 141-142.

48. Ibid.

49. Ibid.

The philosophy behind this is to encourage the Government companies to stand on their own feet and to generate greater internal resources to finance their own growth.

Another technique which is available to the Minister in order to strike a balance between the Government control and the autonomy of the undertakings is the power to issue directives to Government companies on matters of "policy". All the articles of association contain a provision which provides that :

the President may from time to time issue such directives as he may consider necessary in regard to the conduct of the business of the company or Directors thereof, and in like manner may vary and annul any such directive. The Directors shall give immediate effect to directives so issued. 50

The Administrative Reforms Commission has indicated in its report that this power of directives has been rarely issued because of the fact that the management is appointed by the Minister, therefore, he can influence the decisions of a public undertaking through discussion, negotiation and pressure, without issuing a formal directive.⁵¹ It went on to say that

50. S.S. Khera: Government in Business, page 383.

51. A.R.C. Report, page 65.

"the Minister and the Secretary of the department concerned are in actual practice able to exercise greater degree of control over the undertakings than what is formally envisaged by the statutes or even articles of association".⁵²

Hence, the Study Team suggested that:

It would be a sanguine rule that in order to preserve the autonomy of the undertakings, informal controls are minimised and important policy decisions are contained in written directives which are published in the annual reports of the undertakings so that responsibility for the same may be placed squarely on the Ministry. ⁵³

In response to this recommendation, the Government decided that:

where it considers it necessary to issue a directive to a public enterprise asking it to act in a manner different from that dictated by the economic considerations, this should be in writing, and this fact should specifically find a mention in the annual report of the concerned public enterprise. ⁵⁴

For example, the Indian Oil Corporation, in its Annual Reports 1972-73,

52. Ibid.

53. Ibid., page 31.

54. A Hand Book of Information on Public Enterprises, (Bureau of Public Enterprises) (1970), page 151.

gives a heading "Directives received from the President of India under Article 144 of the Articles of Association of the Corporation", and mentions the number and date of the letter received from the Government. It is interesting to find two of these directives asked the Corporation to conduct departmental enquiries against Officers of the Barauni Refinery.⁵⁵

As long as the arbitrary power of appointment and dismissal resides with the Minister, the management becomes most vulnerable and the distinction between the Government department and the Company form becomes meaningless.

The Study Team also suggested that:

by reducing the spread of government control, which appears to be much larger than it need be, government will be able to focus attention on vital and strategic points, and thereby ensure a more effective compliance with their policies and directives. This can be brought about only if there is a change in the attitude of the Minister and the senior officials. In fact, it will require a scrupulous and punctilious self-restraint on the part of the Minister. As the attitude of the Minister depends largely on that of members of Parliament towards autonomy of the enterprise and towards the role of the Minister, it appears

55. Mathur: Public Enterprises in Perspective, page 110.

equally necessary for the Members to impose scrupulous restraint on themselves. We feel that this is essential if the public undertakings are to acquire the requisite measure of autonomy and the ability to stand firmly on their own feet. 56

We entirely agree with these conclusions and would also like to suggest that the part-time members, if appointed, should be drawn from public affairs, social services, non-official agencies, voluntary organisations, and the most successful men from private industry, in order to promote the public interest. This would, hopefully, increase the public acceptability of such undertakings. Full-time members, on the other hand, should be experts and specialists entrusted with the responsibility of the implementation of programmes. And the management should be given a free hand to run their own affairs on business principles.

(11) Audit control

The provision for audit control is contained in section 619 of the Indian Companies Act, 1956, which is in the following words:

- (1) In the case of a government company, the following provisions shall apply, notwithstanding anything contained in sections 224 to 223. 57

56. A.R.C. Report, op.cit., page 30.

57. These sections relate to appointment, remuneration, qualifications, disqualifications, powers, etc. of auditors.

- (2) The auditor of a government company shall be appointed or reappointed by the Central Government on the advice of the Comptroller and Auditor-General of India.
- "Provided that the limits specified⁵⁸ in sub-sections (1-B) and (1-C) of section 224 shall apply in relation to the appointment or reappointment of an auditor under this sub-section. 59
- (3) The Comptroller and Auditor-General of India shall have power -
- (a) To direct the manner in which the Company's accounts shall be audited by the auditor appointed in pursuance of sub-section (2) and to give such auditor instructions to any matter relating to the performance of his functions as such;
 - (b) to conduct a supplementary or test audit of the Company's accounts by such person or persons as he may authorise in this behalf; and for the purposes of such audit, to require information or additional information to be furnished to any person or persons so authorised, on such matters, by such person or persons, and in such form, as the Comptroller and Auditor-General may, by general or special order, direct.

58. Sub-sections (1-B) and (1-C) restrict the number of clients an auditor is legally eligible to audit.

59. The proviso was added by the Companies (Amendment) Act (XLI of 1974).

- (4) The auditor aforesaid shall submit a copy of his audit report to the Comptroller and Auditor-General of India who shall have the right to comment upon, or supplement, the audit report in such manner as he may think fit.
- (5) Any such comments upon or supplement to, the audit report shall be placed before the annual general meeting of the company at the same time and in the same manner as the audit report.

The accounts of Government companies, of course, must be audited by independent auditors. Opinion, however, is divided on the question whether private auditors or the Comptroller and Auditor-General should audit these companies. But the fact remains that the auditors are appointed and re-appointed by the Central Government on the advice of the Comptroller and Auditor-General, who also has the right to comment upon the report or supplement it. This prevents the board of directors themselves appointing auditors. The power to conduct a supplementary or test audit of company's accounts is a valuable one which would keep the auditor alert and on the right course.

Mr. Asoke Chanda, India's Comptroller and Auditor-General, has suggested that "the provision for an independent audit by the Comptroller and Auditor-General would, obviously, be invoked only where the normal audit reveals gross mismanagement".⁶⁰ However, Mr. Chanda

60. A. Chanda: Indian Administration (1958), page 202.

has justified the provisions of the Companies Act, 1956, on the following grounds:

An audit conducted merely for the certification of the balance sheets and profit and loss accounts might not, in these circumstances, safeguard the interests of the tax-payers. It would only afford a permanent measure of immunity to officials for mismanagement and inefficiency. Further, when such units are operated side by side with private units within an industry, an assessment of comparative efficiency is of the utmost importance. The determination of the unit-cost of production for this purpose therefore becomes necessary. In the case of the monopolistic state concerns, it is equally necessary to find and apply a suitable yardstick to assess the degree of efficiency and economy with which these are being operated. An examination of these and other aspects of management, where necessary, can be covered by the issue of directives. An extension of the scope of audit is also necessary to make the reports more informative to meet the requirements of public accountability.⁶¹

Although the type of efficiency audit which Mr. Chanda has in mind has not fully developed yet,

61. Ibid., pages 201-202.

Since 1964-65 the Annual Reports of some of the public enterprises carry a "Review of Accounts by Indian Audit & Accounts Department". The review is prepared by the Comptroller and Auditor-General in accordance with section 619(4) of the Companies Act, which authorises him to 'comment upon or supplement the audit report in such manner as he may think fit'. The review contains comparative statistics for the last three years about the financial position, capital structure, reserves and surpluses, liquidity or solvency, working capital, working results, lost trends, production performance, inventory and production, sundry debtors and turnover. Out of 53 companies whose annual Reports were presented to the Comptroller and Auditor-General in 1970-71, such reviews appear for 31 companies. 62

The question of audit was also considered by the Administrative Reforms Commission. The Commission said in its report that management believed that detailed and continuous audit wasted time and effort and dampened initiative, forcing everyone to caution and leading to centralisation of powers. They maintained that in commercial undertakings, not all decisions or judgements can be correct and unless a serious loss was incurred, management should not be blamed as negligent

62. For a detailed discussion, L. Nairn: Efficiency Audit of Public Enterprises in India (1972), pages 123-35.

or inefficient and efficiency, they said, was a concern of the management which it was hardly equipped to judge. As a solution, the Administrative Reforms Commission has recommended that there should be four or five Audit Boards, each dealing with sector corporations. These boards were to be under the overall control of the Comptroller and Auditor-General. The staff were to be recruited by the Public Service Commission. The boards were to be composed of five members, three to be permanent and common to all boards and drawn from senior officers belonging to the Indian Audit and Accounts Service. The other two were to be part-time members appointed by the Government and in consultation with the Comptroller and Auditor-General, the members being drawn from non-officials with special knowledge of the area of enterprise the board is required to deal with. These boards should attempt to cover all undertakings once in five years. The annual regularity audit by professional auditors, however, would be continued. The Commission also indicated certain lines that ^{the} efficiency audit should take. The success achieved in reducing the cost of production, the efficiency of the services provided, the quality of goods produced, they said, are some of the tests of a competent management and should be considered.⁶³

The Government has accepted the recommendation in its entirety.⁶⁴

63. A.R.C. Report, page 92.

64. A Hand Book of Information on Public Enterprises (1970) (Delhi), page 162.

It has decided to set up audit boards which would consist of three permanent members, all nominated by the Comptroller and Auditor-General and with a Chairman of the rank of an Additional Deputy Comptroller and Auditor-General. For each particular sector of the industry, e.g. Steel, fertilizers, etc., the concerned Ministry would nominate two additional members in consultation and with the concurrence of the Comptroller and Auditor-General. The present system of audit by professional auditors would continue and the auditors would work under the direction of the Audit Boards. The professional auditors should do their normal regular audit plus any other items under the directives given to them by the Comptroller and Auditor-General. The Audit Boards would also do with their own staff an efficiency-cum-proprity audit which, at present, is being done by the Director of Commercial Audit. The arrangements under the new system would not detract from the right of the Comptroller and Auditor-General to undertake any special or supplementary audit if he considers it necessary. The comments of the Audit Boards on the audit of public enterprises would be incorporated in the Audit Report placed before Parliament.⁶⁵

This new arrangement has undoubtedly enhanced the controlling powers of the Comptroller and Auditor-General.

In addition, from time to time the public sector undertakings have

65. A Hand Book of Information on Public Enterprises, (Bureau of Public Enterprises), page 162.

been advised to introduce an effective system of internal audit by the Committee on Public Undertakings. In its 58th Report on Hindusthan Machine Tools Ltd. in 1974-75, the Committee recommended that internal audit system should be introduced as internal audit being one of the essential tools of management control, the Company should activate the internal audit cells in the various units and make use of the reports of internal audit to set right the deficiencies and plug loopholes, if any, in the working of the units.⁶⁶

The Government replied that action was being taken to strengthen the internal audit functions in the various units of the company.⁶⁷

(iii) Parliamentary Control⁶⁸

Parliamentary control over companies begins with the very inception of the Government company. When a Government company is being formed, Parliament provides the money required for the State's proportion of the share capital. Later should a company find itself in difficulties

66. 58th Report on the Hindusthan Machine Tools Ltd. by the C.P.U., (1974-75), page 44.

67. *Ibid.*

68. This section will only deal with the method of Parliamentary supervision by discussions on annual accounts and reports, because the main instruments, e.g. questions, Debates and Committees, to control the public enterprises have already been discussed in Chapter 3.

It is Parliament which decides to help it with a subsidy. It is on such an occasion that Parliament is likely to show the full extents of its interest in the operations of the company. In addition to this, the Companies Act, 1956, contains a provision relating to Parliamentary control of Government companies (section 619A(1)) which provides that :

where the Central Government is a member of a Government Company, the Central Government shall cause an annual report on the working and affairs of that Company to be

- (a) prepared within three months of its annual general meeting before which the audit report is placed under sub-section (5) of section 619; and
- (b) as soon as may be after such preparation, laid before both Houses of Parliament together with a copy of the audit report and any comments upon, or supplement to the audit report made by the Comptroller and Auditor-General of India.

A well-drafted Annual Report serves as an important channel of communication between the enterprise and Parliament, and through it, to the public.

The main purposes of the annual report of a public enterprise would be the following:-

- (I) to fulfil the statutory requirements;
- (II) to provide a record of the year's activities;

(iii) to provide as complete an account of the policies and plans of the enterprise as possible;

(iv) to indicate clearly the efficiency with which an enterprise is operating.

The Board of Directors of every Government company is obliged to lay before the shareholders at its Annual General Meeting a Balance sheet as at the end of the financial year and a Profit & Loss Account for that period.⁷⁰ The Balance sheet shall give a true and fair view of the state of affairs of the company and shall be in the form prescribed or in such other form as approved by the Government.⁷¹ The items for the Profit & Loss Account are to be arranged under the most convenient heads, so as to provide a true and fair view of the profit or loss of the company for the financial year.⁷² In the case of companies not carrying on business for profit, an Income and Expenditure Account is required to be prepared.⁷³

The usual procedure for the exercise of parliamentary control is to present the annual report before Parliament and have a discussion through

70. S.210(1), Companies Act, 1956.

71. S.211, *ibid.*

72. S.211(2), *ibid.*

73. S.210(2), *ibid.*

debates or questions, which are related to matters of general policy and not directed to day-to-day management. Unfortunately, the Government's annual report to Parliament is nominal and contains nothing more than what is contained in the annual report of the company. Perhaps the purpose of allowing three months' time after the annual general meeting to cause an annual report to be prepared on the working and affairs of the company is to provide a comprehensive picture of the affairs of the company to Members of Parliament, which the board of directors may not be able to provide in its formal report to shareholders. In this respect the Estimates Committee has expressed its view in the following words:

Parliament is not interested merely in the rate of dividend declared by the public undertakings but it is also concerned with various aspects of their working such as their physical and financial programme, achievements in relation to the programme, price structure, employment trends, labour relations, organisational changes etc. The Committee suggests that all the undertakings may be advised to describe in their reports their programmes and achievements in greater details; the industrial undertakings may indicate in their reports, inter alia, their unit cost of production, the rate of output per man or per unit of capital employed and other undertakings also may be encouraged to indicate where possible similar co-efficients of efficiency appropriate to their business. 74

The Government accepted this recommendation,⁷⁵ and instructions were given so that the reports are amplified on the lines indicated by the Committee.

Since its inception in 1964, the Committee on Public Undertakings⁷⁶ has been pressing the Government to make the annual reports more detailed and informative. The Committee has suggested that annual reports of public enterprises should contain a review of their performance with reference to the objectives laid down for them.⁷⁷ The Committee has also recommended that if an activity cannot be justified on strictly economic considerations, its effects on the overall working of the enterprise should be published in the annual reports.⁷⁸ To judge the progress of public enterprises in the use of indigenous raw materials and components from year to year, the Committee felt that this information should also be published in the annual report.⁷⁹

75. *Ibid.*, 9th Report, Third Lok Sabha, page 10.

76. This Committee has now taken over the functions of both the Estimates and the Public Accounts Committee so far as public enterprises are concerned.

77. C.P.U., 1st Report, IIILS, page 3.

78. *Ibid.*, 3rd Report, page 9.

79. *Ibid.*, 13th Report, page 52.

If these recommendations are fully implemented, this will enable Members of Parliament and the public to get a clear picture of the role played by the public undertakings in the development of the country's economy.

However, in September 1969, the Bureau of Public Enterprises issued a circular suggesting that the following matters be covered in the annual reports of public enterprises:

Each public sector undertaking is required to attach a report to its Annual Audited Accounts so as to render the financial accounts of the undertaking intelligible and meaningful. The Administrative Reforms Commission has also gone into this question and has recommended that standard operational indices should also be included in the Annual Report of the Public Undertakings for a better appreciation of the performance.

Section 217 of the Companies Act requires the Board of Directors of a Company to indicate in the Annual Report, the state of the Company's affairs, proposed dividends,⁸⁰ allocation to reserves and a general analysis of the important events, while these are the points on which information is required to be included under the provision of the Act, it is necessary that the Annual Report should be made more informative. It is not the intention to prescribe a rigid form of Annual Report, but it would be necessary that

80. The dividend policy and the pricing policy have been discussed in Chapter 4.

Information on the following points is, by and large, included in the Annual Report.

- (1) A summary of financial results indicating the annual turnover, profit after depreciation and interest but before tax, provision for taxation, net profit appropriation to reserves, proposed dividends, etc.
- (2) Information about increase in paid-up capital, long-term loans, etc.
- (3) Important changes in the pricing policy.
- (4) Changes in accounting method as changes in depreciation, valuation of inventories, etc.
- (5) Main events which have influenced the production and profitability of the company under report, and outlook for forthcoming year/s.
- (6) General order book position and production performance vis-a-vis capacities and targets.
- (7) Export achievements and foreign exchange earnings together with future outlook.
- (8) Any significant achievements in import substitution or developments of new products, etc.
- (9) Employee-employer relations - strikes, lock-outs, incentive schemes, training, etc.
- (10) Staff welfare activities - township, education, health facilities.
- (11) New projects or expansions contemplated to increase or diversify the production and progress made so far.

(12) Changes in the Board of Directors and General Managers.⁸¹

It is generally admitted that the more is known, the better it is for all concerned. A well-informed Parliament will interfere less in the operations of the companies, because inappropriate and irrelevant questions which may be damaging at times, result from ignorance and suspicion. It is also admitted that Parliament ought to interfere more if a company is not efficiently run.

(iv) Judicial control

Judicial control of a Government company does not cause a great problem. A registered company is a legal person distinct from its shareholders.⁸² The Indian Courts have reiterated that view. They have said that a Government company is owned by the Government, its board of directors is appointed and removed by the President, and it is bound to give effect to directives issued by the Government. In spite of that, in the eyes of law, the company is treated as having a separate legal personality and existence from that of the Government.⁸³ A Government company, public

81. We have mentioned earlier that some annual reports have been laid on the table, but no discussion or debates took place. Therefore, we are unable to give the reactions of M.P.s towards these reports.

82. Soloman v. Soloman & Co., [1897], A.C.22.

83. Subodh Ranjan v. Sindhri Fertilisers & Chemicals Ltd., A.I.R. 1957 Pat.10; State Trading Corporation v. Commercial Tax Officer, A.I.R. 1963, S.C.1811; S.L. Agarwal v. Hindusthan Steel Ltd., AIR, 1970, S.C. 1150; H.E.M. Union v. State of Bihar, A.I.R. 1970 S.C. 82; State of Bihar v. Union of India, 1970 1 S.C.C. 67.

or private, therefore, is distinct from the Government or any of its departments. The ordinary Civil Courts have full jurisdiction over it just as over any other registered company. The Companies Act has not made any provision for any special tribunal to exercise jurisdiction over the Government company.

The mere fact that the company is wholly Government-owned does not alter its character. A company which is limited by guarantee and incorporated under the Companies Act, 1956, and over which the Central Government exercises some degree of control under the articles of association of the company, is not a public body or authority and is not a local or other authority within the meaning of Article 12⁸⁴ of the Constitution. A Government-owned company cannot exercise any authority as a public body and, therefore, it does not become and cannot be regarded as a public authority.⁸⁵ In Lakshmi v. Neyveli Lignite Corporation's case,⁸⁶ it was held that where an employee was placed under suspension on the basis of a departmental enquiry conducted by the employers of the defendant corporation, it was not possible for such an employee to apply for a writ of Certiorari against

84. In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

85. Lakshmi v. Neyveli Lignite Corporation Ltd., 1966 , 36 Com.Cas., 197.

86. *Ibid.*

the Corporation, insofar as such a corporation is not a public authority, and the proceedings were thus only of a domestic tribunal of a private body and thus, as such, could not be challenged under article 226⁸⁷ of the Constitution.

On another important^{legal}/principle, the Supreme Court of India was asked to pronounce its judgment on whether a Government company can be regarded as an agent or an extension of the Government. The matter was dealt with in the case of the State Trading Corporation v. Commercial Tax Officer.⁸⁸

The facts of the case are that on 18 May, 1956, the State Trading Corporation of India Ltd. was incorporated as a Private Limited Company under the Indian Companies Act, 1956, with an authorised capital of Rs.5 crores divided into five hundred thousand shares of Rs.100 each. Ninety-eight percent of the subscribed capital which was contributed out of the funds of the Government of India stood registered in the name of the President of India, and the remaining two percent in the names of two Joint Secretaries in the Ministry of Commerce and Industries. On 12 February, 1961, the Commercial Tax Officer assessed the Company in the sum of

87. Article 226 relates to the power of High Courts to issue certain writs.

88. A.I.R. 1963 , S.C. 1811.

Rs.5.79198 = 17 up to sales tax in respect of certain transactions, and issued a notice demanding payment of the amount. The Company and Mr. K.B. Lall, Joint Secretary, Ministry of Commerce and Industries, then petitioned this Court for a writ quashing the order of the Commercial Tax Officer, and the notice of demand on the plea that the assessment order and the notice of demand infringed the fundamental rights of the petitioners under Art. 19(1)(f)⁸⁹ and (g).⁹⁰ At the hearing of the petition, Counsel for the Commercial Tax Officer and the State of Andhra Pradesh, submitted that the petition was not maintainable because the Company was not a citizen within the meaning of Art. 19 of the Constitution, and in any event, the Company being an "organ, department or instrumentality" of the Government was incompetent to enforce any fundamental right against the State of Andhra Pradesh. The Court thereupon referred the following question to a larger Bench:

(1) Whether the State Trading Corporation is notwithstanding the formality of incorporation under the Indian Companies Act, 1956, in substance a department and organ of the Government of India with the entirety of its capital contributed by Government. The Court decided

89. Article 19(1)(f) - to acquire, hold and dispose of property.

90. Article 19(1)(g) - to practise any profession, or to carry on any occupation, trade or business.

that the answer should be in the negative.

The State Trading Corporation has been constituted not by any special statute or charter but under the Indian Companies Act as a private Limited Company. It may be wound up by order of a competent Court. Though its functions under the supervision of the Government of India and its Directors, it is not concerned with performance of any governmental functions. Its functions being commercial, it cannot be regarded as either a department or an organ of the Government itself. It is a circumstance of accident that on the date of its incorporation and thereafter its entire shareholding was held by the President and the two Secretaries to the Government of India. 91

As has been observed by Denning, L.J. in Tamlin v. Hannaford, (1950) 1 K.B. 18, that "In the eye of law, the Corporation is its own master and is answerable as fully as any other person or Corporation. It is not the Crown and has none of the immunities and privileges of the Crown". This dictum of the learned Judge has been rightly approved and adopted by the Indian Courts mainly on the ground that the company registered under the Companies Act has an independent legal existence and consequently,

91. S.T.C. v. C.T.O., A.I.R.(1963), S.C., page 1848.

It could not be said to be a department of the Government or its delegate or agent.

The Government company is subject to the doctrine of ultra-vires but the Government may by a mere notification in the Gazette take away the power of the Court to sanction or not to sanction an alteration of the memorandum of association and may, thereby, increase or alter the powers in whatever manner it likes, completely without any judicial control.

This power of modifications and adaptations is contained in section 620 of the Companies Act, 1956, which runs as follows:

- (1) The Central Government may by notification in the official Gazette, direct that any of the provisions of this Act (other than sections 618, 619 & 619A) ⁹² specified in the notification:-
 - (a) shall not apply to any government company; or
 - (b) shall apply to any government company, only with such exceptions, modifications and adaptations, as may be specified in the notification.
- (2) A copy of every notification proposed to be issued under sub-section (1) shall be laid in draft before both Houses of Parliament for a period of not less than thirty days while they are in the session and if within that period, either House dis-

92. Section 618 relates to Government companies not to have managing agents. Section 619 relates to audit control.

Section 619A deals with the annual reports on Government companies.

approves of the issue of the notification or approves of such issue only with modifications, the notification shall not be issued or, as the case may require, shall be issued only with such modifications as may be agreed on by both the Houses.

We must now examine why this potentially far-reaching provision has been introduced in the Companies Act, 1956.

It may be noted that the Indian Companies Bill introduced in the Lok Sabha in 1953, contained no provisions relating to Government companies. In the course of the debate, the Finance Minister gave an assurance that the Government would incorporate suitable provisions in the Act for the regulation of such companies. In pursuance of the assurance, the Government proposed the insertion of a new Part XII-A when the Bill came before the Joint Committee of both Houses of Parliament for consideration. An examination of the proposals disclosed many difficulties, and in particular, that the exemptions and modifications could not be made on a uniform pattern, as the amount of Government interest in, and the nature of the activities carried on by the various Government companies differed very widely. At the same time, it was felt that:

it would be inappropriate to apply to Government companies the clauses of the Bill imposing penalties in respect of failure to do certain things by directors, managers, etc., but those prescribing routine

things like supplying information to shareholders, filling returns, issuing prospectus , etc., should be made applicable to them like any other company. 93

The Joint Committee, therefore, recommended that subject to the above principle, the Government should consider each case or class of cases on merits and decide about the applicability of the various provisions of Act with or without modification.

It is relevant to mention that section 617, which defines a Government company, can now be altered by the notification under section 620 of the Government with the approval of Parliament if so desired. This will enable the Government to include within that term companies in which Government interest is less than fifty-one percent. It could be done by issuing fresh capital to the public, thereby the interest of Government falls below fifty-one per cent. In such cases, the Government may notify that in spite of the fall in the percentage of the Government interest, the Company would continue to be a Government company.

However, our study revealed that during 1973-74, one Government company, Punjab Tractors Limited of the Union Territory of Chandigarh

93. Joint Committee Report, page 51, para. 155.

became a non-Government company with effect from 2 May, 1973, owing to a reduction in the percentage shareholding of the Government in this Company.⁹⁴

The power of modification has been exercised by the Government in November, 1965, with respect to section 23(1). After sub-section (1), the following sub-section shall be inserted, namely:-

(1-A) where the change in the name of a Government Company consists only in the deletion of the word "Private" therefrom that Government Company shall, not later than three months from the date thereof, inform the Registrar of the aforesaid change and thereupon the Registrar shall delete the word "Private" before the word "Limited" in the name of the Company upon the register and shall also make the necessary alterations in the Certificate of Incorporation⁹⁵ issued to the Company.

Although the power to modify the provisions of the Act in relation to Government companies¹ has been conferred on to the Central Government alone, sub-section (2) of section 620 does provide a

94. The Eighteenth Annual Report on the Working & Administration of the Companies Act, 1956, page 17.

95. The above modification of applications of section 23 was made by Notification G.S.R. No.1649, dated 13 November, 1965.

necessary protection. A draft of the proposed notification for modifying the provisions of the Act in relation to any Government company has to be laid before both Houses of Parliament for not less than thirty days. The idea is to give more effective control to Parliament regarding the terms of the notification. This is also clear from the fact that the draft notification has to be laid before both Houses while they are in session so that they may not be ignored by any device.

It is also evident that the Central Government cannot exclude or make any alteration in section 619 and section 619A. These provisions are regarded to be fundamental and apply to all Government companies.⁹⁶

Section 618 provides: "No Government Company formed after the commencement of this Act shall appoint a managing agent". The following argument was put forward in favour of inserting this section:

The main advantages of the managing agency system were that the managing agents provided capital where private investor was shy to invest, helped the newly formed Companies to tide over financial difficulties by loans on cheap terms and provided managerial and administrative expertise at low cost. Now the managing agents came to dominate the Companies for their self-interest. They had the power to

96. Joint Committee Report, page 173.

nominate Directors and by recourse to well-known practices packed the Board with a larger number of their own men. They assured for themselves long terms and heavy remuneration in various forms. The interests of the Company were gradually subordinated to their own interest. However, in the case of Government companies, the Government can supply all the advantages conferred by the managing agents on other companies. Hence, there is no necessity for them. The retention of managing agents in some cases (which had already managing agents) had to be made for various reasons, for example, the Government was reluctant to upset the existing organisational pattern of such companies immediately.

It has been held by the Indian Courts that employees of Government companies are not Civil Servants and so not entitled to the protection offered by Article 311 of the Constitution.⁹⁷

97. Sunil Kumar Deb Nath v. Mining & Allied Machinery Corporation, 1968, 1 Com. L.J. 214; Malik Ram v. Hindustan Cables Ltd., 1968, Com. Cases 500; A.B. Biswas v. H.C.L., 1968, Com. Cases 528; R.K. Chatterjee v. Union of India, 1969, Com. Cases 329; N. Rao v. Indian Oil Corporation, 1969, Com. Cases 896; Verma & Others v. Bokaro Steel Ltd., 1971, Com. Cases 826. In Heavy Engineering Mazdoor Union v. State of Bihar, 1969 Com. Cases 905, the Supreme Court while holding that Government company will ordinarily be presumed not to be a Servant or agent of the State, has also observed that interference may be drawn that such Company is an agent of the Government if, in substance, it also performs governmental functions.

However,

no writ under article 226 of the Indian Constitution will be against a Government Company if there is no public or statutory duty involved.⁹⁸

Though Article 226 of the Constitution is very general, it is well understood that :

a mandamus lies only to secure the performance of a public or statutory duty in the performance of which the one who applies has a sufficient legal interest. No doubt the person against whom it is issued need not be a public officer. It may issue against private officials of a society etc., also, but the subject must relate to public responsibilities. It cannot issue on matters or relationship between a company and its workmen.⁹⁹

It is significant to mention that now it is well settled that the writ of mandamus will lie against those statutory bodies, including those discharging commercial functions. In Prag Tools Corporation v. Immanuel,¹⁰⁰ the Supreme Court observed that mandamus may be issued even to a company if it has been placed under a statutory duty.

98. C.R. Datta: The Company Law (1976), page 960.

99. Praga Tools Corporation v. C.V. Immanuel, 1969 Com. Cases 891 (S.C.).

100. A.I.R. (1969) S.C. 1306.

6.5 Legal Status

A Government company has a name and separate corporate personality. It is capable of suing or being sued in its own name - an independent entity from the Government. It has none of the privileges or immunities of the Executives. It is bound by Acts of Parliament or of State Legislatures just as any other person. The income and property of a Government company is as much subject to taxation as that of any other company.

No notice under section 80 of the Civil Procedure Code is necessary before filing a suit against a Government company.

The doctrine of ultra-vires can be invoked if the acts of a Government company are not provided by the objects contained in the Memorandum of Association. Revenue, taxes and rates due and payable by the company to the Government or any local authority within 12 months of the commencement of the winding-up are entitled to preferential payment under section 530¹⁰¹ of the Indian Companies Act, 1956. The Government is eligible to rank as creditor for any sums advanced to the company as a loan.

The assets of the company alone are liable to pay its debts and liabilities to the extent of its commitments (i.e. limited liability). The

101. The Section relates to Preferential Payments.

legal liability of a Government for breach of contract is subject to the jurisdiction of the Civil Courts.

A Government company is subject to winding-up proceedings like other companies. The Articles of Association usually provide that the question of winding-up shall be reserved for the consideration of the Government at the request of the Special Director or Managing Director, as the case may be. This only refers to the passing of the special resolution by the Company. Once the resolution is passed, the winding-up would follow the procedure laid down in the Indian Companies Act. In cases where the resolution or other action by the company is not necessary, e.g. in a petition by a creditor on the ground that the company is unable to pay its debts, no reference to the Government was required.

6.6. Government Companies in Tanzania

In Tanzania, a company comes into existence by satisfying the requirements of the Companies Ordinance.¹⁰² The Ordinance, however, does not provide any separate precise definition for a Government company. As the Government of Tanzania has used the company form widely, so the Companies Ordinance has had to be modified and amended to suit its requirements. Professor Y.P. Ghai has observed thus:

At first the forms and rules of the private sector company influenced the Government Company, and only minor amendments such as those dispensing with more than one shareholder, general meetings, etc., were made. As more and more substantive amendments were made, e.g. powers to modify articles and memorandum, transfer assets, special procedure for winding up, etc., two streams of company law emerged, one dealing with private and the other with Government Companies. As the Government companies tended to become more important, they began increasingly to constitute the norm by analogy with which private companies were regulated. Thus, governmental powers over dividend policy, compulsory investment in specific securities, registration and winding up, over public sector companies

102. Cap.212, SS.14-17.

were extended to private companies. The two streams are beginning to merge again, but the pattern is that of government company. 103

However, our study entirely agrees with the observation of Professor Ghat. In India, the Indian Companies Act has made special provisions to deal with Government companies, while in Tanzania, the Companies Ordinance has had to be amended to accommodate the Government companies as this form has been used extensively for economic management of the country. The National Development Corporation, for example, controls over 100 companies.¹⁰⁴

But it is appropriate to mention that so far as Government companies are concerned, it will be inappropriate to apply those sections of the Ordinance which impose a penalty in respect of failure to do various things by directors, managers, etc., but those prescribing routine things like supplying information to shareholders, the submission of returns, issuing prospectus, etc., should be made applicable to them like any other company.

We suggest, therefore, that consideration might be given to the creation of two forms of company law: (1) Private Company Law, and (2) State Company Law. This would give State companies a separate status

103. Y.P. Ghat: "Control and Management of the Economy: Research Perspective on Public Enterprise", in the V.R.U., 1976, page 182.

104. The Eighth Annual Report of the National Development Corporation, (1972), page 1.

than that of private companies. But the distinction between corporations and companies would remain, as the former are created by an Act of Parliament or Orders, whereas the latter are created and governed by the provisions of the Companies Act. The Companies Acts, therefore, should be reviewed to develop more definite forms of public accountability, and a code of conduct should be set out to promote desirable social practices in industry. The right of the Government to inspect the accounts and operations would also be established. It would then be possible to distinguish the two types of company, and to ensure that Government companies were fully accountable to the Government.

However, there are two types of Government companies in Tanzania. The first one is companies which are wholly ^{-owned} limited companies; such companies may be owned by one public corporation or several. A single statutory corporation can own the entire shares of a limited company under the 1969 amendment to the Companies Ordinance. These are better known as subsidiary companies. Section 127(1) (Cap.212) of the Companies Ordinance defines a subsidiary company as follows:

127(1) Where the assets of a company consists in whole or in part of shares in another company, whether held directly or through a nominee and whether that other company is a company within the meaning of this Ordinance or not and -

- (a) the amount of the shares so held is at the time when the accounts of the holding company are made up more than fifty per cent of the issued share capital of that other company or such as to entitle the company to make more than fifty percent of the voting power in that other company; or
- (b) the Company has power (not being power vested in it by virtue only of the provisions of a debenture trust deed or by virtue of shares issued to it for the purpose in pursuance of these provisions) directly or indirectly to appoint the majority of the directors of that other company, that other company shall be deemed to a subsidiary company within the meaning of this Ordinance, and the expression "subsidiary company" in this Ordinance means a company in case of which the conditions of this section are satisfied. 105

The second type is companies where the Government holds at least fifty per cent of the total shares. In most cases, the shares are vested in the National Development Corporation, which is a wholly owned Government parastatal. The National Development Corporation took over, for example, 75 per cent shares of the Tanzania Tanneries Ltd. and the remaining 25 per cent is owned by the Ehrnberg and Sons of Sweden,

105. Subsidiary Companies: B.A.T., National Printing Company Ltd., Friendship Textile Mills Ltd., Tanzania Breweries, etc.

51 per cent shares of the Tanzania Breweries Ltd. and 49 per cent shares by East African Breweries Ltd.; 60 per cent shares of the Tanzania Shoe Companies and the remaining 40 per cent shares by Bata Shoe Co. Ltd. (U.K.) in 1967.¹⁰⁶

The control over these companies is exercised in various ways through the appointment of the board of directors. As companies they are obliged to follow their rules and regulations, as set out in their memoranda and articles of association. In most cases, they have two shareholders, i.e. the National Development Corporation and other shareholders in the company concerned. As a majority shareholder, the National Development Corporation has a controlling interest and has the power to appoint more members, and usually it also appoints the Chairman of the board of directors.¹⁰⁷

- (1) The Management of the National Development Corporation is vested in a Board of Directors.
- (2) The Board shall consist of -
 - (a) a Chairman who shall be appointed by the President;

106. This information has been received from Shivji's:
 (1) The Silent Class Struggle (1974); (2) Class Struggles in Tanzania (1976).

107. For a detailed discussion, see James and Lingunya's "Organisational relationship and the Control of the Parastatals in Tanzania", in EALR, Vol.5, (1972), pages 54-57.

- (b) Such other members being not less than five not more than nine as the Minister for Commerce may appoint, one of whom he shall nominate as its Vice-Chairman.
- (3) There shall be a general manager who shall be appointed by the President. 108

The General Manager is the Chief Executive and has under him seven departments. Through these departments, the National Development Corporation exercises control over the subsidiary and associated companies.¹⁰⁹ Therefore, the National Development Corporation has become the important instrument of government policy to formulate and implement the developmental programmes. It would be helpful to mention the seven departments of the National Development Corporation:

108. S.5(1) to 5(3), the N.D.C. (Establishment) Order, GN No.90 of 1969.

109. Associated Companies (50 per cent shareholding): Tanzania Portland Cement Co. Ltd., Hallmark Hotels Ltd., Tanganyika Extract Co. Ltd., Tanzania Distillers Ltd., etc. See James & Lingunya. Hallmark Hotels (T) Ltd. is an associate company of the N.D.C., which holds 30% of its shares. It specialises in hotel management, providing managerial and consultancy services to most of the N.D.C. hotels, including the new projects like the New Africa Hotel, Bahari Hotel, Lake Manyara Hotel, etc.

The remaining 70% of the Hallmark's shares are held by the Hallway Hotel Overseas Ltd., a hotel management firm, linked with the Trust Houses Group of the U.K. and the United Transport Overseas Ltd.

Shivji, I: The Silent Class Struggle, page 26, published Tanzania Publishing Hse, (Dar es Salaam) (1974).

(1) General Manager's Department: The General Manager is informed about the affairs of the corporation by his personal assistant. It has also a legal section which attends to legal matters relating to both the National Development Corporation and its group companies.

(2) The Accounting Department is responsible for all accounting activities of the corporation and gives necessary guidance to all group companies of the National Development Corporation in this respect.

(3) The Administrative Department provides leads in administrative functions of the National Development Corporation. The Corporation's Secretary, the Insurance Manager and the Public Relations Manager are housed in this department.

(4) The Executive Department is responsible for advising the National Development Corporation on policies and programmes for developing the necessary managerial skills.

(5) The Planning and Finance Department is concerned with strategies, policies and plans for the future. It ensures the best use of the National Development Corporation's resources for the achievement of its purposes.

(6) The Development and Research Department carries out investigation and assessment opportunities for investment, and makes its recommendations to the Board. The National Development Corporation management cannot undertake any new project without the sanction of this department.

(7) Operations Department. Further control is exercised by the National Development Corporation through this department. Each company is required to send a monthly report of its operations to the National Development Corporation. The Operations Officer makes a thorough investigation and then reports his findings to the National Development Corporation's Management. But in practice, as it is pointed out by I. Hd'gg: "the Operations Officer sometimes asks for some additional information or clarifications but nothing very important. These contacts are mostly by telephone".¹¹⁰

He goes on to say that:

there does not seem to be any noticeable inconsistencies between the goals of the NDC and the Companies. The NDC takes a more active interest only when problems are encountered in a company. Otherwise the Companies are allowed much discretion - this may also be the consequence of the high turnover of operations officers in the NDC. They have not had time to really get to know the company. ¹¹¹

He further adds that:

the Company managements seem to have great freedom in their ordinary short-term planning

110. I. Hd'gg: Some State Controlled Industrial Companies in Tanzania, page 13.

111. *Ibid.*, page 13.

activities, but unfortunately this view is not totally supported by James and Ligunya. According to them, "this discretion or freedom is not interfered with as long as a company management follows the NDC's policy, otherwise in many cases, the decision of the NDC board of directors, even against the wishes of the other party, is a foregone conclusion." 112

It is recognised that the National Development Corporation is an important instrument to formulate and execute government policy, therefore, its dominance over its subsidiaries cannot be denied.

However, our examination of the Annual Report of the National Development Corporation has not been able to contribute much in this regard. 113 The Report begins with a brief statement from the Minister for Finance. He states that:

the NDC is Tanzania's principal instrument of economic expansion and progress in the fields of productive investment and the NDC's main source of finances are: Income from investment; Interest from loans and repayment of loans made by the Corporation to individual companies in the group;

112. James & Ligunya: EALR, Vol.5 (1972), page 55.

113. Eighth Annual Report and Accounts of the NDC, (1972).

borrowing from international institutions; Tanzania Treasury grants;¹¹⁴ and inter-governmental credits.

The report issued by the National Development Corporation has been scarcely impressive. It leaves out many important matters, for example, information about increase in paid-up capital, long-term loans, etc., important changes in pricing policy, employer-employee relations, new projects or expansion contemplated to increase or diversify the production and progress made so far, changes in the Board of directors and General Manager, etc. The Report is actually a bare statement of profit and loss. It is very difficult, if not impossible, for someone to know what is the actual financial position of a particular company. We suggest, therefore, that the report should be more informative and simple so that the people can easily understand the financial situation of a company - who, in fact, owns it.

The above Companies would be parastatals in practice and, according to the Government statement, for the purpose of providing legal services by the Legal Corporation.

The Government stated that:

A parastatal organization is not an integral part of the Government, but an institution, organization or agency which is wholly

114. Ibid., page 1.

or mainly financed or owned and controlled by the Government. The criterion of such public enterprises would be ownership by the Government of fifty per cent or more of the capital shares or other form of governmental participation and effective influence in all the main aspects of the management of the enterprise. ¹¹⁵

The methods of control, e.g. control by the Minister, control by Parliament, audit control, etc., which are employed to control the activities of parastatals, therefore, will be applicable to these companies as well. These techniques have been discussed earlier. In addition to these, two new Acts ¹¹⁶ have granted to the Minister for Finance wide powers to control prices, dividends and investment of companies. These Acts were originally designed to control the private sector companies, but the scope of them has been extended to Government companies as well. ¹¹⁷

The Tanzania Government has been continuously equipped with legal powers for price control since 1920. ¹¹⁸ 1950 saw an unprecedented

115. G.N. No. 1976 of 1967.

116. (i) The locally manufactured products (Price Stability) Act, 1972, No.24 of 1972.
 (ii) The Companies (Regulation of Dividends and Surpluses) Act, 1972, No.22 of 1972.

117. Act No.16 of 1974.

118. H. Kimble: The Price Control in Tanzania, page 33.

rise in prices, and in that year a Committee was appointed to investigate the whole question of rising costs, and in 1951 a new Price Control Ordinance ¹¹⁹ was passed. This Ordinance empowered the Government to appoint a Price Controller to be responsible for the administration of the Ordinance. ¹²⁰ The Price Controller could from time to time by Order published in the Gazette:-

(a) fix maximum prices for the sale of any goods -

- (i) by any person to any person; or
- (ii) by their manufacturer to or through the agency of a trader in such goods; or
- (iii) by a trader in such goods to another trader in such goods; or
- (iv) by a trader in such goods to a person who is not a trader in such goods; or
- (v) by a person who is not a trader in any particular goods to a trader in such goods; or

(b) to (f) fix maximum service charge or hire charge or commission that may be made in respect of any sale or prescribe the type of packing, weight, size, quality, etc. ¹²¹

119. Cap.309.

120. S.3(1)

121. S.5(1)

The maximum penalty for breach of the Act was a fine of ten thousand shillings or imprisonment for 2 years or both and, in the case of a second or subsequent offence, a fine of twenty thousand shillings or imprisonment for 5 years or both.¹²²

But unhappily, the period 1965-67 saw the most marked rise in the general price level.¹²³ The Government was determined to take more positive steps to combat this problem. In 1967, a National Price Control Advisory Board¹²⁴ was established, which included representatives of consumers, trade unions, retailers, wholesalers, as well as officials and economic advisers. A network of Regional Boards was also set up to advise or restrain Regional Commissioners in their new role as Assistant Price Controllers.¹²⁵

Between January and March, 1968, a number of price orders were issued by the Price Controllers in respect of meat, bread and other essentials. Although the Board was not very successful, "one of the main achievements of the Board", says H. Kimble, "was to institute detailed enquiries into the

122. S.20(1)

123. For a detailed discussion, see H. Kimble: The Price Control in Tanzania, pages 35-41.

124. G.N. No.79, 1967.

125. S.3(2).

markets for several commodities where little information had previously been available on channels of trade and price information".¹²⁶

The Tanzania Government has been seen to be actively concerned over the price problem since then. In 1972, the Locally Manufactured Products (Price Stability) Act was passed to combat price rises in certain goods manufactured in Tanzania. The Act prohibits any manufacturer, wholesale or retailer to sell or offer for sale a specified product at a price higher than he normally sold such product at immediately before the effective date" (which is 15 June, 1972) for those products specified in the original schedule: tyres, tubes, pangas, jembes, ploughs and similar agricultural implements.¹²⁷

Section 5(b) authorises the Price Controller to fix a price where a product is first manufactured after the effective date.

The Price Controller can authorise price increases by the manufacturer and it is a defence for a seller to satisfy the Court that he was merely passing on to his customer the additional cost he had paid for the product.¹²⁸

126. *Ibid.*, *op.cit.*, page 33.

127. S.41, also see J.S. Read: "Tanzania" in the Annual Survey of African Law, (1972), page 135.

128. S.6(1).

Section 11 lays down the penalty clause. In the event of the provisions of the Act being violated, the maximum penalties are a fine of twenty thousand shillings or imprisonment for 5 years or both. A principal or employer will be held liable unless they prove their innocence.

Owing to inflationary pressures, unpredictable world markets and prices for its goods as well as its steady rise in population growth and basic poverty, the Price Control Ordinance, 1951 (Cal.309) and the Locally Manufactured Products (Price Stability) Act, 1972, failed to check the rise in prices.

However, it is appropriate to quote the observations of H. Kimble:

Price control can only help to even out the short term fluctuations in prices and to reduce price variations between consumers, in spite of the risks and difficulties involved. They can also reduce some prices, although not all. The maximum impact will be achieved when the controlled prices are clear-cut, realistically calculated, well-publicised and applied to a limited range of essential commodities. 129

129. H. Kimble: The Price Control in Tanzania, page 51.

We are quite aware of the fact that the prices of goods do not entirely depend on the condition of the domestic economy alone; they are greatly influenced by the international market forces, for example, the prices of many products went up owing to the five-fold rise in the price of petrol since 1974.

As has been mentioned earlier, a statutory system of price controls was adopted since 1920 in Tanzania. The Price Control Ordinance, 1951 (Cap.309) continued until 1973. The Acts (i.e. (1) the Price Control Ordinance, 1951; (2) The Locally Manufactured Products (Price Stability) Act, 1972) were always intended to narrow the gap between the "have" and "have nots", which was always the main objective of the present leadership. However, in order to achieve this goal, a new machinery was set up in 1973.¹³⁰

The Regulation of Prices Act, 1973,¹³¹ established a new machinery for the control of prices.

The National Price Commission has now taken over the functions of the former Price Controller, with Assistants and Advisory Boards. The Price Commission consists of a Chairman, who is appointed by the President,

130. J.S. Read: "Tanzania" in the Annual Survey of Africa, 1973, pages 155-156. (See, for a detailed discussion, The Regulation of Prices Act, 1973).

131. No.19 of 1973.

and Chief Executive Officer, and five to seven members appointed by the Minister.¹³² Regional and District Development Directors are Assistant Price Commissioners at their respective levels.¹³³

Section 6 of the Act empowers the Commission:

- (a) to determine reasonable price structures on a national basis and to provide for their orderly variation when necessary;
- (b) to ensure that prices of goods and services in Tanganyika are compatible with and conform to the principles of socialism and the political, economic and social aspirations of the people of the United Republic;
- (c) to perform such other functions as are conferred on it by this Act or as the President may, from time to time, by order published in the Gazette, confer upon it.

It is an indication that Tanzania is now trying to use regulatory mechanism to control the activities of the public sector, for example, in this case, the prices of products manufactured by parastatals and other companies.

Section 12(1) of the same Act has mentioned certain specific factors that are to be taken into consideration by the Price Commission

132. S.3(1) to 3(c).

133. S.7(1) to 7(5).

In fixing price structures. It says that :

the Price Commission shall, in determining the price structure of any goods or services or class of goods or services, have regard to -

- (a) the commodities and services essential to the community;
- (b) the need to avoid unduly rapid or frequent variations in prices;
- (c) the need to preserve and promote the competitive position of local products in the domestic market as well as in foreign markets;
- (d) the need to prevent the income of peasants and workers in the United Republic from being affected adversely by unnecessary and unjustified price increases;
- (e) the need to maintain fair relationships among the incomes of different sectors of the community;
- (f) the need to ensure the continued ability of the Government to finance development programmes and recurrent expenditure;
- (g) the need to provide circumstances under which local manufacturing, processing and service industries are able to maintain efficiency and expand their business;
- (h) the need to provide circumstances conducive to a healthy and orderly development of trade and commerce in rural areas as well as urban areas;

- (f) such guidelines as to margins or otherwise as the Minister may from time to time issue.

Read aptly comments that:

this sub-section not only illustrates the complexity of the challenging responsibilities laid upon the Commission but also makes a remarkable exposition of the fundamentals of the Tanzanian policies towards trade and commerce. 134

Section 8(1)(a) to 8(1)(g) has given various other powers to determine price structures, namely:

- (a) power to fix maximum prices for the sale of any goods, including used goods, by any person (including manufacturer, importer, wholesale or retailer);
- (b) power to fix maximum hire and service charges;
- (c) power to determine maximum commission charges and maximum hire-purchase charges;
- (d) power to prescribe types of packing, weight, size, quality, processing and ingredients of any goods manufactured in Tanganyika.

134. J.S. Read: "Tanzania" in the Annual Survey of African Law, (1973), page 155.

An Assistant Commissioner may determine price structures for the region, but his decision may be reviewed and changed by the Commission, subject to the Ministerial discretion.¹³⁵ A similar power has also been given to the Assistant Price Commissioner at district levels.¹³⁶ Section 10(6) empowers the Minister to establish Advisory Committees, at regional and district levels, in order to advise the Assistant Price Commissioner. A trader will commit an offence, if he charges a price above the maximum fixed by the Commission.¹³⁷ In such a case, a maximum fine of Shs.50,000/- and/or imprisonment for five years may be imposed on the offender. Sections 27 and 28 empower the Price Commissioner, the Assistant Commissioners, Senior Police Officers, other authorised persons and Price Inspectors to inspect, investigate and report upon any breach of the Act.

A striking new power given to the Price Commissioner or any Assistant Price Commissioner is the authority to certify a large number of matters such as not merely the maximum prices but what constitutes a wholesale or retail sale and the total amount of overcharge

135. Ibid., S.10(1) and 10(2).

136. Ibid., S.10(5).

137. Ibid., S.17(1).

Involved in any transaction; such a certificate is admissible in evidence in any proceedings and the Court must presume that it is valid and correct unless the contrary is proved. 138

The question now remains whether these measures have been able to combat domestic inflation as well as improve the balance of payments situation.

In 1977 a combination of good financial housekeeping and high world prices for tea and coffee helped the balance of payments so much that there was at least some relaxation of the restrictions on the importation of spare parts and other essentials. At the same time, the rate of inflation has slowed sharply (although no figure was given) having been (officially) up to 26 per cent in 1975. 139

It is significant to mention that it is difficult to control prices by legislation alone, as Nyerere himself has admitted that " Our nation is still economically dependent upon the vagaries of weather and upon economic and political decisions taken by other peoples without our participation

138. J.S. Read: "Tanzania" in ASAL (1973), page 156. S.29(1)(a) to 29(1)(g) and S.29(2). For a full discussion of the above Act, see the above article.

139. The Economist, 17 March, 1978, page 12.

or consent." ¹⁴⁰

The other Act, i.e. the Companies (Regulation of Dividends and Surplus) Act, 1972, ¹⁴¹ has authorised the Minister for Finance to impose limitations on the amount of dividends which could be given to shareholders and direct a company to invest its funds in specified Government securities or other investments. ¹⁴²

Section 7(1) lays down that :

No company whether or not specified shall in respect of any financial year, declare dividends the aggregate sum of money payable in respect of which,

- (a) exceeds the sum of money which when deducted from the company's net worth in respect of such financial year will have the effect of reducing such net worth of the company to a sum which is less than 120% of the par value of the company's paid up share capital at the close of the financial; or

140. The Guardian, 21 April, 1977.

141. The main purpose of the Bill is to give power to regulate levels of dividends and uses of cash flow of companies and corporations so that they serve the national interest. Bill Supplement No. 4 (Govt. Printer, Dar-es-Salaam, June, 1972).

142. A good account of this Act can be found in J.S. Read: "Tanzania" in the Annual Survey of African Law, (1972), pages 133-134.

- (b) Exceeds the largest of the following sum of money namely:-
- (i) the average of the annual profits of such company during the financial year immediately preceding such financial year; or
 - (ii) 80% of the profits in the financial year immediately preceding such financial year;
 - (iii) where the company first commenced its business immediately before or during such financial year, 80% of its profits in such financial year.

The Minister is also empowered to sanction larger dividends with prior approval by resolution of the National Assembly.¹⁴³ In the case of certain specified companies,¹⁴⁴ the Minister can order any one of these companies to limit its dividends further, to an aggregate not exceeding a prescribed percentage of the companies approved net worth, or he can order the company to declare and pay dividends and may then prescribe a minimum

143. S.7(2).

144. 'Specified companies' means a company specified in Part I of the Schedule to the Act and includes a corporation specified in Part II of the said Schedule (Section 2).

A sample - The list of specified Companies and Corporations:

(1) African Trading Co. Ltd. (2) Banco Products (Tanzania) Ltd.
 (3) Burns and Blane (Tanzania) Ltd. (4) Car & General (Tanzania) Ltd. (5) Hallmark Hotels (T) Ltd., etc.

(1) Tanzania Sugar Board - Corporation.

There are 59 companies in Schedule I and 1 Corporation in Schedule II.

aggregate for such dividends as a percentage of approved net worth.¹⁴⁵

The Minister can order specific companies to submit, at least thirty days before each financial year, cash flow budgets showing clearly estimated receipts within a specified period.¹⁴⁶

The Minister can pass an order under section 11(2), before the year starts or within three months of receiving the budget, to the company to invest a certain amount of its estimated receipts, within a prescribed period, in specified Government securities or other investments.

The Act names fifty-nine companies, but the Minister for Finance has added more than seventy companies to the list which section 13(1) authorises him to do.¹⁴⁷ One cannot agree with Read more when he said: "The Act thus attempts a cure for the weakness of investment policy shown by parastatal organisations, amongst others, in the past."¹⁴⁸

145. S.9, Net worth is the difference between the value of all assets minus all liabilities at the end of the financial year; 'approved net worth' is equalled to the net worth shown by the latest audited balance sheet plus the portion of profits which the Minister is satisfied has been spent subsequently in specified ways.

146. S.11(1).

147. J.S. Read: "Tanzania", ASAL (1972), page 134.

148. *Ibid.*, op.cit., page 134.

The Act also confers powers on the Minister for Finance to introduce special controls to deal with foreign companies.¹⁴⁹

Now we would like to come back to section 7(1) of the Act in order to assess its effect on the Specified Companies. The main effect of this wide section is to narrow down and limit the amount of money paid as dividends to shareholders, to make the company ^{pay} as little as possible and to facilitate internal accumulation of capital within the company itself. The purpose is to make available money to help in the development of the nation and to enable the company to expand its activities. The intention, no doubt, is good but the question remains whether both the long-term and the short-term investors sacrifice their interest equally. It seems to us that the section operates to the detriment of the short-term investors. The long-term investors are not interested in ready cash but in the domestic accumulation of capital within the company which will give them more return in the future and also would help them to borrow less from banks and financial institutions, which is no doubt a costly affair. Therefore, they try to declare very little dividends. Sometimes, the shareholders are given each a few more shares in which case, share capital increases and the money retained for investment within the company increases. This can now be done legally under the above-

149. S.8(1).

mentioned provisions.

Under section 6(a), no Court can make an order for the winding up of a specified company. This again would work out to the advantage of the long-term investors and to the detriment of the small short-term shareholders. Therefore, under the Act, a resolution for the winding-up of a company which has been specified under the Act, by the members cannot, under any circumstances, succeed. This benefits the long-term shareholders.

Another intention of the Act is to restrict the expatriation and expropriation of capital generated by foreign companies to maintain a healthy financial base at home. For that reason, the Act has chosen special 'specified companies' and restricted them to declare more dividends than the amount allowed by the Act itself. However, it is also appropriate to add that in order to encourage foreign investors, the Government has attempted to allow some of these companies to declare dividends which are higher than those allowed by the Act.

It is difficult to predict at the present time what will be the total effect of the Act in the long run.

CHAPTER 7

WORKERS' PARTICIPATION IN MANAGEMENT

- 7.1 Britain
- 7.2 India
- 7.3 Tanzania

7.1 Britain

The question of workers' participation in the management of public enterprises in the United Kingdom must be considered in the context of recent discussions concerning workers' participation in industry generally. Mr. Peter Shore, then Secretary of State for Trade, announced to the House of Commons on 5 August, 1975, that he was setting up an Independent Committee of Inquiry to consider ways of extending industrial democracy in British industry. The Committee, chaired by Lord Bullock, was given the following terms of reference:

Accepting the need for a radical extension of industrial democracy in the control of companies by means of representation on boards of directors and accepting the essential role of trade union organisations in this process, to consider how such an extension can best be achieved, taking into account in particular the proposals of the Trades Union Congress Report on industrial democracy, as well as experience in Britain, the E.E.C. and other countries. Having regard to the interests of the national economy, employees, investors and consumers, to analyse the implications of such

representation for the efficient management of companies and for company law. 1

In its Report, published in 1977, this Committee expressed in unequivocal terms the purpose of, and need for, increased participation by workers in the management of both public and privately-owned undertakings.

With changes in the structure of the economy and the nature of the society since World War II, the question of workers' participation has come to focus increasingly on the need to involve employees to a greater extent in company decision-making. 2

The Committee went on to say that:

the power and complexity of the industrial enterprise and the remoteness of decision-making have led to demands for large companies to be more responsive to the needs of society in general and of their employees in particular. Industry has come under pressure to consider the wider effects of the decisions it takes in pursuit of profitability, and companies now explicitly or implicitly accept that they have

1. Report of the Committee of Inquiry on Industrial Democracy, H.M.S.O. (1977), page 5.

2. Ibid., page 20.

responsibilities not just to shareholders, but also to employees, customers, creditors, suppliers, the local community and to society at large. 3

More recently, a recognition, shared by Government, management and trade unions, of the urgent need for British industry to be more responsive to change if there is to be any hope of reversing the relative decline of this country's industrial performance, has led to the development of tripartite industrial strategy. This is founded on the assumption that Britain's industrial problems can only be successfully remedied by concerted action to improve the performance of industry. Trade union involvement is seen as fundamental to the strategy, not simply because such involvement is necessary to forestall negative resistance to change, but also because employees through their trade unions have a positive role to play in combating industrial stagnation and in stimulating much needed changes in industrial structure and performance.

Furthermore, new concepts of the role of employees in decision-making at company level are not just reactions to economic trends. They also derive from social changes which have taken place since the War, especially rising standards of education and higher standards

of living. The effect of these social changes has been an increasing desire among employees to control their working environment and to have a say in decisions which affect their working lives. They have become less prepared to accept unquestioningly unilateral decisions by management, and have shown a readiness to challenge a decision if it seems to have ignored their point of view or to affect them adversely. Traditional management prerogatives have therefore come under attack, and the modern manager has had to develop a style of participative management, which has recognised the necessity and the benefits of involving employees in decision-making, rather than imposing decisions upon them without consultation. 4

The special issues raised by the question of workers' participation in the management of public enterprises were considered by the Trades Union Congress in 1944 with the publication of the "Interim Report on Post-War Reconstruction", which rejected the idea of direct workers' representatives on the board of the new corporations, which was anticipated would be set up, on the following grounds:

It will be essential not only for the maintenance and improvement of standards and conditions of the work place, but because of the

4. Ibid., pages 22-23.

power of independent criticism that they may exert, that the trade unions shall maintain their complete independence. They can hardly do so if they are compromised in regard to Board decisions which are not considered to be in their members' interests by the fact of their representatives' participation in them.

Moreover, unless a workers' representative participates in responsibility for, and thereby authority over, the direction of the industry, his status is likely to be in fact advisory or consultative. The tendency will be, however, for effective authority in administration to lie in the hands of those appointed as full-time directors of the industry. Members of the governing body cannot at the same time answer to the workers of the industry as their representatives and bear responsibility to the Minister for its administration. To attempt to lay such a double duty on them may well result in making the Governing body in a sense a negotiating committee, in which the workers' representatives will be in an ambiguous position.⁵

The T.U.C., however, strongly suggested that some of the members of the board should be chosen from a list which it would put forward to the Minister after consultation with the Unions involved, so that the interests of the workers of the industry and their points of view could be more

5. T.U.C., Interim Report on Post-War Reconstruction, (1944), page 21.

effectively taken into consideration in the management of the Corporations, but the T.U.C. thought it proper that the nominees should sever any trade union connections whilst taking office.

The recommendations of this Report were substantially implemented in the Constitutions of the new public corporations established by the post-war Labour Government, following the nationalisation of some major industries. On the one hand, efficiency and the development of production were stated to be the major duties of the new corporations, and on the other, whilst no direct representation of the workers was provided for on the boards of these corporations, amongst the qualifying criteria outlined in the statutes for the Minister to take into consideration in the selection of the members was for nominees to be qualified "as having had wide experience and shown capacity in the organisation of workers".⁶ These Acts, however, are silent as to any obligation of the Minister to nominate any director with a trade union background or from a list of names put forward by the trade unions.

It is interesting to mention that the Ministers in charge of various industries "appointed some directors from senior trade unionists,

6. S.2(3), The Coal Industry Nationalisation Act, 1946; S.3(2), The Electricity Act, 1947; S.5(4), The Gas Act, 1948; S.1(2), The Iron & Steel Industry Act, 1949.

but these individuals holding office had to abandon all their trade union affiliations".⁷

The Study also revealed that nine of the forty-seven full-time members and seven of the forty-eight part-time members of the Boards of Nationalised Industries had some trade union background.⁸

It is difficult to assess the significance of the appointment of a handful of directors with trade union background to the Boards of the nationalised industries. This composition could hardly be described as the involvement of workers' representatives in the decision-making process. The impact of these directors on the Boards, therefore, was almost ineffective. However, the functions of negotiation and joint consultation through the trade union machinery, which were given basic statutory framework, were expected to fulfil this need. This conception of the public corporation was kept unchanged for over two decades by the leadership of the T.U.C. and the majority of the Labour movement.

The late Lord Melchett, when he was Chairman of the British Steel Corporation, introduced "worker directors" to that undertaking in the middle of the 1960's. This experiment had no legal basis, for the Iron and Steel Act, 1967, which re-nationalised the steel industry merely

7. A study by the Action Society Trust: The Men on the Boards: a study of the composition of the Boards of Nationalised Industries (1951), pages 6-9.

8. *Ibid.*

provided for the obligation to negotiate and consult with trade unions following the pattern of the post-war nationalisation acts.⁹ The scheme was devised by mutual agreement between the British Steel Corporation and the T.U.C. Steel Committee. Initially, 12 worker-directors were nominated on the four regional groups' divisional boards, but the number was increased to 16 when, in 1970, the steel industry was re-structured on a product basis. In the same year, the Minister appointed a worker as a member of the Board of the Corporation. The Chairman of the B.S.C. had selected the worker-directors from a short list of candidates prepared by the T.U.C. Steel Committee. The worker-directors were expected to spend fifty per cent of their working week on their ordinary job. They were holding this part-time office in their individual capacity and it was stressed that they did not do so as representatives of the work force. In consequence, they were required to relinquish the holding of any union office.

It is important to note that these worker-directors sit on the divisional boards which are not executive or policy-making bodies. They advise the divisional managing directors who themselves hold executive power under the authority of the National Board of the Corporation. In practical terms, the appointment of worker-directors on the boards was

9. S.1(3).

not designed to create a seat for the opposition at the centres of decision-making, the reason was perhaps to bring into the boardroom the point of view and expertise of any men from the shopfloor and possibly, in return, to help the diffusion of the point of view of the management.

The employee director's role is to ensure that divisional boards are aware of the ideas and beliefs held by work-people and that the decisions taken following board discussions are informed by a knowledge and understanding of these ideas.

At the same time, he will learn from the professional manager of the commercial, operational and other factors which influence decisions - and can thus contribute these points of view to the shopfloor. 10

This role of the worker-directors was, however, very unclear, but in 1969, a job description was worked out with the help of the B.S.C.

Senior executives:

This made it clear that employee directors could participate in advisory committees, working parties, and study groups; that they could attend formal and informal meetings of functional directors and local management

10. R. Smith: The Future of Employee Directors (1972), page 5.

at the invitation of the Divisional Managing Directors; that they could go to their own and other trade union meetings and could attend consultative meetings as observers. 11

The Alexander Committee, an informal study group, came to the conclusion that "seen from either an overall management perspective or an overall union perspective, it had not achieved any significant degree of success". 12

A very appropriate comment on the role of the worker-directors was made by Mr. B. Cassidy:

Not only did they feel that they fulfilled little useful purpose in their advisory capacity but their very functions and the question of their accountability were unclear, and above all they tended to be ostracized from all quarters. In addition to this, the majority of managers were always very hesitant in acknowledging the contribution that these worker directors could make to the exercise of their functions and in some cases

11. Quoted from a report presented to the B.S.C. and the T.U.C. Steel Committee, by an independent study group under the Chairmanship of Professor K. Alexander of Strathclyde University, in 1971, page 15.

12. Ibid., page 14.

there was hostility over the promotion of subordinates to such a high office. 13

However, following the Alexander Committee report, the worker-director scheme, which had been so far tried only on an experimental basis, was adopted as a permanent feature of the B.S.C. Substantial modifications were, however, agreed upon. The most important modification was that the restriction on worker-directors's holding union office was withdrawn, and a new selection procedure, allowing greater involvement of the trade union members and organisation, was adopted. For their part, the Unions resolved to keep closer contacts than before with the worker-directors. Finally, the worker-directors were permitted to take an active part in the joint consultative meetings, and, whilst retaining an interest in all matters within their product division, they were expected to concentrate on the works within a designated area, thus keeping a closer working relationship with their fellow employees in that particular area.

It remains to be seen whether these alterations will give a new dimension to the role of worker-directors and whether the more representative

13. B. Cassidy: Workers on the Board: a Study in Employee Participation (1973), page 38.

nature of their revised role will affect their relationship with other directors, who see them more as channels of communication.

The T.U.C. now officially supports the representation of workers on the Boards of Nationalised Industries appointed through Union and the T.U.C. machinery. It has thus proposed the following changes:

- (i) Legislation for nationalised Industries should be altered to provide for one-half of the board to be trade unionists, having some regard to the wider public interest;
- (ii) The procedure for appointment should be altered to provide that Ministers should formally seek nominations from the T.U.C. for trade union appointments to all nationalised boards of statutory status.
- (iii) The T.U.C. would normally seek nominations from Unions within the industry covered by the board. 14

This was the situation in the nationalised Industries with regard to workers' participation in management before the Bullock Committee was appointed by the Government to examine the whole question of industrial

14. Quoted from B. Cassidy: Workers on the Board: a Study in Employee Participation (1973), pages 39-40. (A document concerning workers' participation was prepared by the General Council of the T.U.C. and was presented to the T.U.C. in 1968).

democracy in British industry.

Now we come back to the Bullock Committee's findings. The recommendations of the Committee have again brought the matter of workers' participation in management into the open. The Committee, which had three trade union representatives, three members from the Confederation of British Industry and two academics, began work in December, 1975. The Committee began their work by examining the T.U.C. main proposals contained in the 1974 Report on Industrial Democracy and the C.B.I. proposals for an extension of industrial democracy in British industry, which are discussed later.

The main T.U.C. proposals are as follows:

- (a) Workers' representation on the board to be a legal right which a recognised and independent trade union may demand;
- (b) Selection of representatives to be through trade union machinery;
- (c) Half the seats on the board to be occupied by worker representatives;
- (d) the provisions to apply (at least initially) to all companies and groups employing 2,000 or more people;
- (e) the responsibilities of worker representatives to be analogous rather than identical to those of shareholder directors, and their accountability and reporting back to their constituents to be safeguarded. 15

On the other hand, the C.B.I. laid strong emphasis on the value of voluntary participation schemes.

A fundamental principle, therefore, on which proposals for greater employee involvement in company affairs must be based, is that participative arrangements must be designed to fit a company structure, and not vice versa. Moreover, such participative arrangements must be sufficiently flexible to accommodate the various forms of participation already in operation successfully, and to the satisfaction of all parties, in a number of companies. ¹⁶

After 28 meetings of the Bullock Committee between December 1975 and December 1976, its Report, with its recommendations, was published on 26 January, 1977. The Committee's three members from the Confederation of British Industry refused to put their signatures to that Report. They argued that participation should involve all employees, not just trade unionists, at every stage. It should not be introduced in a company until an employees' council has been in successful operation for at least three years. ¹⁷

The main recommendations of the Bullock Committee are as follows: ¹⁸

16. *Ibid.*, page 30.

17. *The Times*, dated 12 January, 1977.

18. *Bullock Report*, pages 92-108.

- (1) The major new right of the workers would be the right (which the workers in each company that employs 2,000 or more people can choose to take up or not) to elect through trade union machinery a number of worker representatives, equal to the number of shareholder representatives, who sit on the board of the company that employs them. This right should apply to companies that are subsidiaries of foreign-owned multinationals as well as to British-owned companies.
- (2) In addition to the equal numbers of worker and shareholder representatives, the board would also have a third, smaller group, of independent members jointly agreed by the other two groups. The Report calls this the "2x + y" formula.¹⁹ The Committee

suggest that the size of each x
in the fall-back solution should
be as follows:

for a company or group with
2,000-9,999 employees = 4
for a company or group with
10,000-24,999 employees = 5
for a company or group with
25,000 or more employees = 7

We propose that the size of the
co-opted group of directors, the
y element, should be related to
the number of employee and
shareholder representatives, who
sit on the new board, as follows:

Where the number of employee
and shareholder representatives
together is less than 14 (i.e.
 $x = 6$ or less) : 3
Where the number of employee
and shareholder representatives
together is 14 or more : 5. 19

- (3) The shareholders' meeting will have only limited jurisdiction, with its power of veto restricted to issues like the acquisition and disposal of assets. But the following important matters of company policy will be handled by the new unitary boards of worker and shareholder-appointed directors, together with a smaller number of independents:-
- (a) Winding-up of the company;
 - (b) Changes in the memorandum and articles of association (these cover the capital structure of the company, the duties and responsibilities of directors so far as these are not covered by law, procedures to be followed by the board and so on);
 - (c) recommendations to the shareholders on the payment of dividends;
 - (d) changes in the capital structure of a company (e.g. by an increase or decrease in authorised share capital, or by a merger);

- (e) disposal of a substantial part of the undertaking;
- (4) The law should clearly specify certain key areas where the responsibility to take final decisions would rest with the board. The two key areas suggested are: (i)
 - (i) the allocation or disposition of resources (this effectively means all planning, investment, research, development and budgeting decisions).
 - (ii) the appointment, removal, control and remuneration of management.

The Bullock Committee also recommends that the nationalised industries will be included in such legislation, and the workers in these industries will have parallel representational rights. An interdepartmental Committee, chaired by Mr. Alan Lord, Second Permanent Secretary in charge of the Treasury's domestic economic sector, has been set up to coordinate industrial democracy for the nationalised industries.²⁰ It is probable, in this field, that the Government would make a general statement of intent and leave individual industries to make their own arrangements within an agreed framework.

The Bullock Committee Report has received the seal of approval from all Cabinet Ministers and most Trade Union leaders. For Mr. Booth,

20. The Times, 11 January, 1977.

Secretary of State for Employment, it is not simply a matter of equity or efficiency: "We are too highly developed a nation not to capitalize on the sophistication of our most valuable asset - people". He continues that: "I am convinced from examples I have seen in action that if interest and initiative are encouraged, an unsuspected seam of expertise knowledge, talent and energy can be opened up."²¹ Mr. Jack Jones, former General Secretary of the Transport and General Workers Union, believes that "if there is to be any hope of convincing the workers of the virtues of private enterprise, the way to do it is to include them in decision-making at the top."²²

"It is high time", Mr. Len Murray, General Secretary of the T.U.C., told industrialists recently, "that Capital and Labour were recognised as equal partners". He argues that "if decisions are taken jointly, this would provide a new legitimacy for management, and force the Unions to move away from the negative veto role of resistance".²³

Lord Bullock is of the opinion that :

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- 21. The Times, 10 January, 1977.
 - 22. The Economist, 12 February, 1977, page 110.
 - 23. The Economist, 22 January, 1977, page 95.

Worker representation on the board emphasises an important change in the attitude of the trade union movement. Previously the emphasis has been on the need for nationalisation: now the trade unions are seeking a new relationship with industry on the basis of which the private sector can continue and be strengthened. 24

However, the attitude of employers and the C.B.I. towards this Report is not sympathetic. They reckon the Bullock Report is dead. The powerful Engineering Employers' Federation has already made it clear that Bullock will be implemented over its dead body.²⁵

Sir Geoffrey Howe, the Shadow Tory Chancellor, claims that worker directors, Bullock style, would only enhance the Unions' power to obstruct industrial choice.²⁶

But Mr. Prior, Conservative spokesman on employment, wants participation enshrined through codes of practice rather than statute, with possible minority worker representation on the board.²⁷

24. The Economist, 12 February, 1977, page 110.

25. The Economist, 22 January, 1977, page 95.

26. Ibid., page 95.

27. The Times, 10 January, 1977.

The C.B.I. policy document proposals on involvement and participation, of 1973, opposes any form of participation or consultation imposed by legislation. The document states that "It has never been believed that any director ought to be imposed on a company by the trade union or anyone else."²⁸ It goes on to say that "It is possible that employee representation on company boards may in time be a logical development but it must not be imposed; it must come about voluntarily, when both management and employees are ready for it."²⁹

Lord Caldecot, Chairman of Delta Metals, welcomes workers' participation on employers' terms. He says that:

We fully accept the wish of most employees to have a bigger say in the development of the company in which they work, and the best way of doing this seems to be develop participation from the bottom upwards. My own view is that virtually everyone wants to be consulted and to know that his views are properly considered, but then he expects a manager to take a firm decision quickly in the light of all the circumstances and consultation, and to be responsible for its outcome.³⁰

28. The Times, 16 November, 1977.

29. *Ibid.*

30. *Ibid.*

The views of the T.U.C. and the C.B.I. on the subject are diametrically opposite. The T.U.C. wished to see the legislation on the statute book by 1978, whereas the C.B.I. wished to adopt this scheme on a voluntary basis.

Arguments and debates, for and against, over the subject of workers' participation in management will perhaps continue for some time to come before this is finally accepted as a permanent feature of the economic management. One hopeful sign is that the Post Office Board and the Unions have agreed that an experiment in industrial democracy within the Post Office should run for two years without commitment to either party. The proposals on which the experiment would be based were worked out by the Board and the Unions.

During this experiment, the Post Office Board at national level will be reconstituted to consist of a Chairman together with 16 members. The Chairman of the Board will be appointed by the Secretary of State for Industry.

Of the 16 members of the Board, 6 will be appointed from management by the Secretary of State, in consultation with the Chairman. 6 members of the Board will be appointed from Post Office Trade Unions. In the first instance, these will be

elected through their appropriate Trade Union constitutional machinery. Their names will then be submitted to the Secretary of State who will retain the statutory authority to appoint them to the Board. They will be full members of the Board with the same responsibilities as other members.

4 members of the Board will be part-time members who will be genuinely independent. The Secretary of State will consult both management and the Trade Unions before appointing the outside members and will not make appointments against the reasonable objections of either. 31

The Trade Union members will be accountable and, therefore, would report back regularly to Executive Councils and to Annual Conferences.

A Trade Union member of the Board would not be expected publicly to defend a decision of the Board which was at variance with Union policy, but would be expected to refrain in public from attacking such decisions. Like all other Board members, they would be expected to explain the Board's reasons for decisions, including any with which they disagreed.³²

31. Union of Post Office Workers, Annual Report, 1977, page 198.

32. Ibid.

On 4 January, 1978, Mr. Eric Varley, Secretary of State for Industry, announced the names of the Unionists and Independent members who will serve on the Post Office Board and also increased the number of membership from a maximum of 16 to a maximum of 19 (no specific reason was given for this enlargement). The Board will now consist of seven members, each from the Trade Unions and management, and five independent members.

Trade Union members include two from the Union of Post Office Workers, two from the Post Office Engineering Union, and one each from the Post Office Management Staffs Association, the Society of Post Office Executives, and the Civil and Public Services Association.³³

This is the first full-scale experiment in industrial democracy in a major nationalised industry. Its working will be closely watched by many interested groups, for example, the Government, managers of the private sector industry, Unions and so on. Its success will encourage others to introduce this scheme, but its failure will encourage the Government to shelve the idea of workers' participation in management, at least for the time being. An editorial in The Times has given a guarded welcome to this scheme introduced in the Post Office:

33. The Times, 5 January, 1978.

A judgment on the effectiveness of the new system will have to await the passing of the full two-year period, although initial indications give little cause for hope that the experiment will succeed. But if the Trade Union members forget their sectional interests, and behave as true directors should, they may yet prove the pessimism to be unfounded. If this happens, they will have done a real service both to the cause of industrial democracy and to the nation as a whole. 34

The statement seems to suggest that the success of this experiment falls squarely on the shoulders of the Trade Union members alone. But, we believe that the responsibility lies with all the members of the Board equally to make this experiment a success.

Having said that, it is appropriate to mention the concluding observations of both the majority and minority reports of the Bullock Committee. The majority report concludes:

During our inquiry we found a widespread conviction, which we share, that the problem of Britain as an industrialised nation is not a lack of native capacity in its working population so much as a failure to draw out their energies and

34. The Times, 5 January, 1978.

skill to anything like their full potential. It is our belief that the way to release those energies, to provide greater satisfaction in the work-place and to assist in raising the level of productivity in British industry, is not by re-crimination or exhortation but by putting the relationship between Capital and Labour on a new basis.

The minority report rejects the Committee's terms of reference as being

far from satisfactory or even wise. We believe that industry is not ready for such radical changes, that management evidence before the Committee was disregarded and that the majority see proposals as a way of changing the structure of society by bringing the boards of the private sector under trade union control. We do not want the system to be based on trade unions. 35

We have restricted the discussion within our bounds, i.e. the public sector. The scheme has got off the ground under the auspices of the Labour Government. It is likely to be followed by experiments in other public corporations. However, it is difficult to predict what form and shape this will take if and when the Conservative Party comes into

power, for it has not stated any definite or concrete proposals relating to the idea of workers' participation in management. We suspect that the Party will perhaps follow the C.B.I.'s line of reasoning. This means that if the proposed Industrial Relations Bill becomes an Act, it will have to die a premature death.

Nevertheless, we maintain that "those who will be substantially affected by decisions made by social and political institutions must be involved in the making of those decisions".³⁶

We have discussed the present situation in Britain in the hope and expectation that India and Tanzania, each of which has committed itself to introduce the scheme of workers' participation in management in its respective industries, will gain some experience and shape their policies in the light of such experience.

36. Bullock Report, page 25.

7.2. India

The present situation in India with regard to workers' participation in management has been summed up by the Minister for Industry, George Fernandes, at a press conference in New Delhi in 1977. He said that:

Like the previous Government, we also accept the idea of workers' participation in management in principle. Until recently it was on a voluntary basis, but it did not achieve the desired result. We intend to pass legislation to make it compulsory. 37

Our study of various Acts of nationalised undertakings reveals that the principle of direct representation of trade union members on the boards of public corporations has been completely ignored. No legal validity has been given to this principle in any of the Acts.

However, the concept of workers' participation was first stated at the Industrial Policy Resolution of 1956, which provides that:

It is necessary that proper amenities and incentives should be provided for all those engaged in industry. The living and working conditions of workers should be improved and their standard of

37. The Times of India, 5 September, 1977.

efficiency raised. The maintenance of industrial peace is one of the prime requisites of industrial progress. In a Socialist democracy labour is a partner in the common task of development and should participate in it with enthusiasm. There should be joint consultation and workers and technicians should, wherever possible, be associated progressively in management. Enterprises in the public sector have to set an example in this respect. 38

Later, the second Five-year plan declared in clear terms that, for the successful implementation of the Plan, increased association of labour with management is necessary. Such a measure would help in:

- (a) promoting productivity for the general benefit of the enterprise, the employees and the community;
- (b) giving employees a better understanding of their role in the working of industry and of the process of production; and
- (c) satisfying the workers' urge for self-expression, thus leading to industrial peace, better relations and increased production. 39

38. Government of India Resolution on Industrial Policy, dated 30 April, 1956, para.17, page 8.

39. The Second Five-Year Plan (Planning Commission, Government of India), page 577, para.18.

Following the policy declaration in 1956, a study group was sent under the Union Labour Minister to visit a number of countries to study the ideas and practices in this field. They were particularly impressed with the scheme which was in operation in Yugoslavia.

In every enterprise there are three organs of management - the workers' Council, the Managing Board and the Director of the enterprise. The Workers' Council is elected by all the workers and office employees on the basis of adult franchise through direct and secret voting. Workers from the basic activity of the enterprise must account for at least two-thirds of the members of the Workers' Council. Its term of office is two years and its strength of membership varies from fifteen to sixty. The Workers' Council is the top organ of the enterprise. It then elects the Managing Board (consisting of three to fifteen members) which, in its turn, controls the work of the Director. However, the Director has the right and obligation to prevent enforcement of any resolutions of the Workers' Council and the Managing Board which are against the law of the land. The Workers' Council conducts the economic and personnel policy of the enterprise and issues all the fundamental acts of the enterprise - its statute, pay scales, rules on labour relations, safety precautions, etc.

It allocates the net receipts, issues the economic plans, prepares the balance sheets and statements of accounts. 40

Although the concept and method of workers' participation in Yugoslavia is very effective, it is not particularly suited for India, as the nature of society and the political system is different.

It is true to say that the Yugoslav experiment has been reasonably successful, but this has been mainly due to the fact that, under President Tito's leadership, workers have shown a sense of discipline and public interest. The Yugoslav experiment is unique and should not be cited as a model. 41

However, the study group submitted its report in April, 1957, and the subject was included on the agenda of the 15th session of the Indian Labour Conference under the auspices of the Ministry of Labour. The I.L.C. discussed the item and, accepting the idea of workers' participation in principle, indicated the broad guidelines for its implementation. The guidelines recommended by the 15th session of the Indian Labour Conference were:

40. N. Balog: Some Experience in the Management of Yugoslav Industrial Enterprises (1969), page 20.

41. N. Das: Experiments in Industrial Democracy, page 145.

- (i) The Joint Management Councils should be set up and their main functions should include communications, working and living conditions of workers, productivity, suggestion schemes, administration of labour laws, etc.
- (ii) The Councils should have consultative status in matters like changes in standing orders, retrenchment and closures, procedures for engagement and punishment of workers, etc.
- (iii) The Councils should have the right to seek and receive information about the undertaking's economies, technology, etc., and the connected documents and elucidations.
- (iv) Issues like wages, bonus and individual grievances should be excluded from the Council's functions which should otherwise be flexible.
- (v) To reduce the danger of apathy, the Councils should be entrusted with some administrative functions in fields such as welfare, safety, training, starting hours of shifts, rewards for suggestions, and so on.
- (vi) Willing and active co-operation of middle and junior managers, supervisors, etc., should be enlisted in the operation of the scheme.
- (vii) Tripartite machinery should be built up at the Centre and in the States to guide and direct the work in this field with Government providing leadership, but not making it a departmental affair. 42

Following this, a seminar on Labour-Management Co-Operation took place on 31 January and 1 February, 1958, at the initiative of the Labour Ministry. They decided to experiment with the joint Councils of Management in 24 undertakings.⁴³

In reply to a back-bencher's question on workers' participation in public undertakings, Mr. Shah, the Minister of Industry, replied in the Lok Sabha:

Government have introduced the Scheme of participation labour in two undertakings. The experience gained in these two undertakings would have to be assessed and then a further decision can be taken in regard to extending this to other undertakings. 44

In addition, joint Management Councils were also set up in 24 undertakings. Out of these 24 undertakings, 10 were in the public sector.⁴⁵

In most cases, the functions of the joint Management Council were four-fold:

43. Ibid.

44. Lok Sabha Debates, 1 September, 1959, 1041. The two undertakings are: (1) Hindustan Antibiotics Ltd. (2) Hindustan Insecticides Ltd.

45. S.S. Khera: Government In Business,

- (i) In the first category, the Council shall have the responsibility to discuss employees' suggestions, labour laws, sense of participation and channels of communication.
- (ii) the Council shall be consulted regarding the administration of standing orders, introduction of new methods and reduction.
- (iii) the Council have the right to receive information and discuss the general economic position (including accounts, reorganisation schemes, etc.)
- (iv) the Council shall be entrusted with the administration of welfare measures, supervision of safety measures, training schemes, working hours, rewards for suggestions and any other matter agreed upon. 46

However, these experiments did not make much headway, for example, in the case of Hindustan Machine Tool Ltd., the scheme had to be abandoned due to some disputes regarding the representative character of two rival unions.⁴⁷

Between 1959 and 1962, the progress of the pilot project was reviewed in a succession of meetings of the Standing Labour Committee,

46. V.V. Ramanadham: Public Enterprise in India (1959), page 83.

47. S.S. Khera: Government in Business, page 182.

the Indian Labour Conference, a second seminar and by a conference of Central Ministers where the possibility of implementing the scheme in the public sector was examined. The Labour Ministry appointed an Officer-on-Special duty in the Chief Labour Commissioner's organisation to keep track of the working of the scheme in the units which had volunteered for the pilot project. A special tripartite Committee was also set up by the Ministry to advise and assist in the implementation of the scheme. In spite of so much enthusiasm for it, the pilot project made little or no progress.

A former Director-General of the Employees' Federation of India, writing in 1964, observed that:

many employers have reported unsatisfactory working of the joint machinery. The most important factor responsible for this state of affairs is the absence of healthy, constructive and good industrial relations in the undertakings, e.g., Saxby & Farmers Ltd., Indian Bobbin Co. Ltd. ⁴⁸

In fact, he blamed trade union leaderships and trade union rivalries for poor industrial relations.

The National Commission on Labour also observed:

48. N. Das: Experiments in Industrial Democracy, page 150.

"Even where Councils exist, they are reported to be ineffective and their functioning unsatisfactory in many cases", and further opined that:

In undertakings in which industrial relations are not cordial and even arrangements like works committees, grievance procedure and union recognition are absent, joint management councils cannot be expected to function satisfactorily. 49

Among other causes mentioned by the Commission for the failure of worker's participation in management, are:⁵⁰ lack of adequate interest and enthusiasm among employers and unions; multiplicity of bipartite bodies; a prejudice among employers against the idea of workers' participation in management, presumably out of a fear of encroachment on their prerogatives; a tendency among workers to transgress the limits of joint consultation by seeking to break into areas of management rights or of collective bargaining; inadequacy of training facilities for both labour and management; and inter-union rivalry.

We are of the opinion that to remedy this state of affairs, there must be a strong trade union organisation ready and willing to take a responsible view of the matter, and it should have a full complement of experts who can fully understand the techniques and finances

49. Report of National Commission on Labour, 1969, para. 24.13.

50. Ibid.

of the Industry for which a joint Council of Management has been set up.

It is appropriate to mention that even in 1971-72, the situation has not improved very much.

Virtually no information is provided of efforts to bring about workers' participation in management, except a brief reference to the existence and functioning of the Works Committees, or joint management Councils in some annual reports. The Electronics Corporation, for example, states that apart from representation on committees like the Works Committee and Grievances Committee, workmen also participate in certain areas by their representatives being given a place on committees like Canteen Management Committee, Welfare Fund Committee, etc. Apparently, there is not much to report on workers' participation in management by the public enterprises. 51

The author went on to say that the success of industrial democracy in a large measure depends on an educated labour force, but virtually no reference has been made to workers' education in the Report.⁵²

However, the Committee on Public Undertakings in its 58th Report

51. L. Naram: Public Enterprises in India, page 93.

52. Ibid., page 93.

on Hindusthan Machine Tools Ltd., recommended that the Company should spare no efforts to give workers in the Undertaking a sense of participation and involvement in the challenging task of greater production for the good of the community.⁵³

The Government replied that these observations have been brought to the knowledge of the management for compliance.⁵⁴

Although the Government took the initiative to popularise workers' participation in management since Independence, it has not yet achieved its desired goal.

Now again the idea of workers' participation in management has been revived and has even been given a place in the much-publicised new 20-point economic programme of the then Prime Minister, published in 1975.

The Government have laid down broad guidelines for this scheme. They have kept the scheme sufficiently flexible so that it can be adjusted to the requirements of any particular industry. Both employers and employees have reacted enthusiastically. The main objectives of workers' participation have been described as follows:

53. C.P.U., 58th Report, (1974-75), page 47.

54. Ibid.

- (a) Maximization of production and productivity;
- (b) Development of skills among workmen and the creation of adequate facilities for training;
- (c) Optimal use of raw materials and adequate control on the quality of finished products;
- (d) Evolution of suitable measures for the welfare and safety of workers; and
- (e) Maintenance of discipline at the shop-floor and the plant level. 55

It is admitted that a happy and content work-force is an essential feature of a nation's economy. Therefore, a scheme for workers' participation in management is definitely a good move in the right direction. But the question remains whether this scheme will succeed this time. The chances are far from good. Because of the fact that this scheme, like the previous one, is for voluntary adoption with help and encouragement from the Government. One of its main objectives, as mentioned above, is to maximise production and productivity. Without undermining the importance of this objective, it could be said that it is of indirect interest to labour and trade unions. The areas which matter most to workers like

wages, job security, bonus, or working hours are to be settled by collective bargaining and, hence, do not fall within the jurisdiction of joint consultation. But other areas, for example,

conditions of work, safety, work planning and assignment at the shop-floor and so on, do belong to that arena. These areas alone will be unable to create enthusiasm amongst workers for this scheme. In addition, the success of this scheme will depend upon the attitude between employers and trade unions towards each other and the relationship between rival unions at the plant level.

In reply to a question relating to workers' participation in management, the Minister for Steel, Mines and Fuel replied that the Scheme of Workers' participation has been introduced in 21 undertakings, for example, Bharat Aluminium Co. Ltd., Bharat Gold Mines Ltd., Hindustan Copper Ltd., Hindustan Zinc Co. Ltd., etc. 56

Mr. Ravindra Varma, Labour Minister of the present new Government, has reassured the House again that "the Government would formulate clear and constructive scheme that would enable full and effective participation of workers in management. This was one of the Party's election promises to which the Government was fully committed." Referring to the

efforts made during the last three decades, the Minister said:

the means and methods that were adopted in the past were not adequate to ensure effective participation by workers in management. We had been groping, we had been experimenting to find an effective means for workers' participation in management. It could be claimed that the attempt which was being made now was something more than the commitment made in the past since it was based on the evaluation of the past experiments. 57

The present Government is only one year old. They have promised to provide provisions for workers' participation in management at various levels, for incorporation in the Comprehensive Industrial Relations Bill. The Bill has not been introduced yet, therefore, it is too early to make any meaningful or constructive comment on their success or failure.

However, we believe that an improvement in the quality of trade union leadership and the change in management attitude would pave the way for workers' participation in management in India.

57. The Statesman, 28 January, 1978.

7.3. Tanzania

The first duty of a Tanzanian is to work. "There is no such thing as socialism without work".⁵⁸ Nyerere stated that:

a truly Socialist State is one in which all people are workers and in which neither capitalism nor feudalism exists. It does not have two classes of people, a lower class composed of people who work for their living, and an upper class composed of people who live on the work of others. In a really Socialist country no person exploits another.⁵⁹

Therefore,

we aim at building a classless society for one reason. In no state is there enough wealth to satisfy the desire of a single individual for power and prestige. Consequently, the moment wealth is divorced from its purpose, which is the banishment of poverty, there develops a ruthless competition between the individual; each person tries to get more wealth, simply so that he will have more power, and more prestige, than his

58. J.K. Nyerere: Ujamaa: Essays on Socialism, page 6.

59. *Ibid.*, page 15.

fellows. Wealth becomes an instrument of domination, a means of humiliating other people.⁶⁰

But Nyerere wants to build a nation where "all the members of society must equally be sovereign; they must be free to change peacefully the laws that rule them and the personnel in the positions of leadership".⁶¹

He recognises that "such a society depend on a willingness to cooperate and an understanding of the different kind of life which can be obtained by the participants if they work together".⁶² In other words, the people should be given proper opportunity, training, education, etc., to develop themselves. He said that education should be designed

to prepare people for their responsibilities as free workers and citizens in a free and democratic society. They have to be able to think for themselves, to make judgements on all issues affecting them; they have to be able to interpret the decisions made through the democratic institutions for our society, and to implement them in the light of the peculiar local circumstances where they happen to live.⁶³

60. J.K. Nyerere: Freedom and Unity, page 207.

61. J.K. Nyerere: Freedom and Socialism, page 5.

62. J.K. Nyerere: Freedom and Development, page 190.

63. Svendsen and Teisen (Ed): Self-Reliant Tanzania, page 225.

Nyerere sees workers' participation in management as one of the essential ingredients of a Socialist society. He believes that voluntary co-operation by individuals is necessary to their progress as developed human beings.

The people's freedom to determine their own priorities, to organize themselves, and their own advance in welfare, is an important part of our objective. It cannot be postponed to some future time. The people's active and continued voluntary participation in the struggle (for development) is an important part of our objective because only through this participation will the people develop. And to us, the development of the nation means the development of people. The people are more self-confident; not only is the future to determine, but they know it is theirs to determine. 64

The starting point in the case of Tanzania is the Presidential Circular on Parastatals, No.1 of 1970, entitled "The Establishment of Workers' Councils, Executive Committee and Boards of Directors". In the President's words:

64. J.K. Nyerere: Freedom and Development, pages 330-333.

Given a proper work environment and proper co-operation and support from their leaders and fellows, the majority of Tanzanian workers are capable of accepting more responsibility, and would like to do so; they can become more creative and can accomplish more. Easy communication of ideas and information between workers and all levels of management, can have the effect of improving the quantity and quality of goods produced, provided that an atmosphere of common endeavour and common responsibility is created. In particular, the top management have an attitude which regards the workers and the lower levels of management as partners in a common enterprise, and not just as tools like the machine they work with.

Furthermore:

true industrial discipline does not exclude the workers in an industry from participation in the enterprise, or from a responsibility for its improvement. Indeed, true discipline in a work place should be easier when the workers understand what they are doing, what their objective is, and when they know that they have contributed to the final result as fully respected partners.

Hence,

there must be provision for the workers to be represented on bodies which consider matters of production, sales, and the general organisation of the enterprise. It has therefore been decided that all parastatal organisations shall, as soon as possible, and in any case not later than the end of 1970, establish Workers' Councils, and shall establish or re-establish their executive committees and Board of Directors so as to give practical effect to workers' representation and participation in planning, productivity, quality and marketing matters.

The Circular goes on to say that:

every Corporation or firm employing more than ten workers shall establish a Workers' Council which shall be constituted as follows:

- (a) A TANU Chairman of the Branch established at the business.
- (b) The Manager or the General Manager.
- (c) All Heads of Department or Sections.
- (d) All members of the Workers' Committee.
- (e) Workers' representatives elected in proportion to the number of workers in different departments or sections, provided that the number of the workers' representatives does not exceed three-quarters of the total membership of the permanent members (i.e. permanent members mean (a), (b), (c) and (d) above). In

other words, if for example, the number of members of the Workers' Council under (a), (b), (c) and (d) together total 24 members, of whom the number under (d) is 12, then the Workers' representatives should not total more than 6.

- (f) Co-opted members from outside the business as and when required. The presence of such members shall be determined by agreement between the National Union of Tanganyika Workers (N.U.T.A.) and the Management. The N.U.T.A. shall be entitled to send a representative to the Workers' Council meeting. 65

The functions of the Workers' Council in, and in relation to, the business for which it is established shall be:

- (a) to advise on the requirements of the existing wages and incomes policy as announced by Government from time to time;
- (b) to advise on the marketing aspects of the commodity produced;
- (c) to advise on matters relating to the quality and quantity of the commodity produced;
- (d) to advise on matters of planning;

- (e) to advise on others aspects of productivity, such as works and enterprise organization, technical knowledge, workers' education, etc.
- (f) to receive and discuss the Balance Sheet. 66

In addition, there will be the Executive Committee, which will perform the following functions:

- (a) to scrutinize financial and production estimates prepared by management;
- (b) to scrutinize labour programmes, including programmes for raising workers' productivity and education which are prepared by management and the N.U.T.A.;
- (c) to scrutinize finance, production, quality, export and marketing programmes, in consultation with the body or bodies concerned;
- (d) to advise on the execution of the general policy as proposed by the Workers' Council and approved by the Board of Directors; and
- (e) generally advise on the efficient running of the day-to-day work of the industry. 67

The Board of Directors shall have at least one of its members

66. Ibid.

67. Ibid.

nominated by the National Union of Tanganyika Workers.⁶⁸

The concept of workers' participation in management has influenced Nyerere because of the fact that :

a Socialist Society is not built up solely on monetary incentives, but on ideas of service to society and the willingness on the part of the latter to recognise such service. It is necessary in this context that the worker should be made to feel that, in his own way, he is helping to build a progressive state. The creation of industrial democracy, therefore, is a prerequisite to the establishment of a Socialist society.⁶⁹

However, Professor Ghat argues that:

Worker participation issues have to be seen in the context of sharing power and enhancing enterprise accountability rather than in terms merely of good industrial relations. How far worker participation does perform this function depends on the political consciousness of the worker. ⁷⁰

68. Ibid.

69. Workers' Participation in Management: Bombay Management Association (1962), page 19.

70. Y.P. Ghat: "Control & Management of the Economy: Research Perspective on Public Enterprise", in VRU (1976), page 169.

No doubt, it is true that there is some element of truth in his observation, but it could also be argued that an association of labour with management would be useful in satisfying the workers' urge for self-expression, thus leading to industrial peace, better relations and increased co-operation.

Although "there are in most parastatals Workers' Councils which are represented in the Boards and are involved in every stage of management",⁷¹ Shivji has observed that:

In respect of workers' participation and control of the industrial sector, the bureaucrats show reservation to talk about workers' participation and control of the industrial sector. Their method of organisation, set up, etc., are not only typically bureaucratic but also bourgeois. There is much more paraphernalia surrounding the sumptuous headquarters of the parastatals than the factories - the productive units. The advertisement campaigns mounted by various parastatals are no different whatsoever from what one gets from private companies. They are more an effort at 'sales promotion' and stimulation of consumers demands than an attempt to educate the public and provide for their needs. However, despite definite signs that a powerful economic bureaucracy is in the making in

71. An occasional paper on "Tanzania Law and Economy", submitted by Mr. L.S. Ballonzi, an LL.M. Student of S.O.A.S., 1975-76.

Tanzania, it is clear that they do not have an upper hand as yet. The TANU leadership does manage to raise the alarm when the bureaucracy appears to adopt non-Socialist measures. Thus recently, following the President's directives, the parastatals are going to have Workers' Councils to participate in management and running in industries. The fact that the bureaucracy does not have its way completely does not mean that it is weak either. At any particular time, therefore, what measures are taken would very much depend on which side has the upper hand. Many Socialist measures - for example, a drastic cut in conspicuous consumption, genuine workers' participation in management, etc. - cannot be easily carried out because of the resistance from the bureaucratic machinery. 72

The Statement indicates that there is a certain amount of tension existing between the Workers and Management.

The reason for lack of total acceptance of the Circular has always been supported with reasons that the workers are not educated and competent enough to assume the managerial role. Though there is some validity in this argument, this is not the main reason. The

72. I.G. Shivji: The Silent Class Struggle (1974), pages 35-36.

main reason is that the management is not willing to fully integrate the workers in decision-making. They only want to give piecemeal rights of participation.⁷³

It cannot be denied, however, that education generates confidence and confidence creates interest and enthusiasm. Therefore, the education is an important element which makes people conscious about their role and responsibility. In order to educate the workers so that they can assume responsibility and behave as a director should, the Government of Tanzania should set up a Workers' Management Training College. This institution should be designed mainly to train workers to enable them to play their part in schemes of workers' participation in the management. The Tanzanian Universities and Trade Unions will have to play a major role in this regard and see it as their long-term objectives to provide teaching and research programmes designed to produce workers with managerial talent and skill needed to run the board efficiently. These, we believe, would help promote the intelligent participation by workers in management.

Loxley and Soul aptly suggested that:

the education which is necessary must be of a certain type, a type which the elite themselves are generally least able to provide -

73. Quoted from Loxley & Soul: "Political Economy of Parastatals", in the E.A.L.R., Vol.5, (1972), page 33.

as much political education, designed to raise consciousness, as technical education, designed to provide information about the enterprise itself. 74

They also observed that:

armed with Mwongozo, the workers appear to have gone beyond the economism of wage demands (especially since the incomes policy makes them redundant) and have been paradoxically 'side-tracked' into the more difficult but significant pursuit of workers' control. Their strikes have been about and against unsympathetic management, lack of consultation, commandism at the work place, the maltreatment of trade union leaders (or conversely, the ineffectiveness of the same leaders). 75

This conflict will not only hinder the progress of workers' participation in management, but also affect the production and the productivity of workers. It has been reported recently by Mr. Cleopa Msuya, Minister for Industries, in the National Assembly that:

a survey of 10 enterprises in Dar es Salaam showed that 820,000 man-hours had been lost in 1976 through processions and public meetings, workers' education,

74. Ibid., page 33.

75. Ibid., page 33.

cultural activities and military parades. This was the equivalent of closing the Tanga Steel-rolling mill for three years. 76

Despite this shortcoming,

there was a renewed emphasis in 1975-76 on worker participation and management re-education. Worker and TANU directors (at least one a shop floor worker) were added to most parastatal boards in 1975 and a goal of forty per cent worker directors set for 1976. TANU seminars for managers stressed the need for genuine worker involvement and initiative in respect of management to become general and not limited to a few firms, for example, N.B.C., Ubongo, Farm Implements, etc. 77

However, Shivji is not very pessimistic; he has specifically concluded that:

for a strategy like this to succeed the working class must be surely and firmly in political power. The State power must be in the hands of the workers and peasants led by the present revolutionary party and not the bureaucracy.

76. The Economist (London), 4 March, 1978, page 16.

77. Africa Contemporary Record, Colin Legum (Ed.), (1975-76), page B326.

A class - In this case, workers and peasants - cannot build a society in its interests without wielding political power. Building Socialism is the workers' and not the bureaucrats' business. 78

It is encouraging to note that the Chairman of the National Development Corporation has stated that "Workers' Councils have now been formed in the majority of group companies, and others are following suit." 79

It could be concluded from the above observations that the workers are now aware of their rights, responsibility and place in the society. However, it is important to bear in mind that a programme or scheme which is put forward for its adoption, is greatly influenced by the political philosophy which the country practices. Therefore, it is an imperative necessity to put into practice the idea of workers' participation in management in transforming the country into a Socialist society, which is the declared objective of Tanzania. "Tanzanian workers", says Loxley and Saul, "properly plugged into the national development effort, thus remain a potentially building block for Socialist Construction." 80

78. I.G. Shivji: The Silent Class Struggle, page 36.

79. 7th Annual Report, (1971), page 19.

80. Loxley & Saul: "Political Economy of Parastals" in E.A.L.R., Vol.5, (1972), page 34.

CHAPTER 8

A COMPARATIVE ANALYSIS AND CONCLUSIONS

- 8.1 The Role of Public Enterprise
- 8.2 Forms of Organisation
- 8.3 Relation between Management and Ministry
- 8.4 Parliamentary Control
- 8.5 Other Institutions
- 8.6 Judicial Control
- 8.7 Legal Services
- 8.8 Workers' Participation in Management
- 8.9 Conclusions

The present investigation assumes that the public enterprise is a key instrument by means of which to operate certain economic functions of the State. A characteristic feature of this century, especially since the Second World War, has been an increasing involvement of governments in the economic field. The influence of governments on the social, political and economic life of their respective communities has been far-reaching. The nineteenth century gospel of "laissez-faire", i.e. the doctrine of State non-interference, has given place to the increasing acceptance of Socialism. With the spread of Socialist ideologies in countries like Britain, India, Tanzania, etc., governments began to experiment in a somewhat tentative way with industrial and commercial activity under their own direct initiative and management.

There is hardly any country to-day in which government is not engaged actively and directly in establishing and managing commercial and industrial enterprises. These range from basic transport systems - railways, road, air and shipping enterprises - to energy systems - the generation of power and its distribution - to the mining and processing of coal, iron and other minerals, and indeed to industrial enterprises of all kinds, such as machine tools, fertilizers and chemicals, the manufacture of aircraft, locomotives and transport equipment; financial

services such as banking and insurance; Indeed every conceivable sort of industrial and commercial activity, productive of goods and services. In varying degrees, governments everywhere are involved in industrial and economic management.

Public enterprises, especially in India and Tanzania, embrace the entire national life and are the foundation of economic planning and Socialism.

The reason why India and Tanzania were chosen for a comparative study of public enterprise is that despite their diversities in religion, tradition, culture, language and political system, one thing which both countries share is a particular social philosophy.

The present Chapter, therefore, will attempt a brief comparative survey of the position of public enterprise, as it obtains in India and Tanzania, under the following heads.

8.1 The Role of Public Enterprise

Both countries have constitutionally committed themselves to establish Socialist societies. It could be argued, therefore, that to achieve social, political and economic goals in a Socialist economy, the State's direct involvement in the fields of commerce and industry is necessary. Hence, both India and Tanzania have decided to use public enterprise as an instrument for economic development and social justice.

In 1975, the then Prime Minister of India, Mrs. Indira Gandhi, told the public sector enterprise management:

The public sector cannot be judged on the basis of investment but on the basis of actual services which it makes available to the country and the surplus that it generates for further investment. We advocate a public sector for three reasons: to gain control of the commanding heights of the economy; to promote critical development in terms of social gains or strategic values rather than primarily on considerations of profit; and to provide commercial surpluses with which to finance further economic development. The final test lies in profitability, service and growth.

She further observed that:

there can be no stereo type of the public sector. It must grow, evolve and change with the times. In another twenty years, the public sector might well be larger than the government in terms of personnel and budgets.

She summed up her observations about the public sector as follows:

There is no question whatsoever of playing down the importance of the public sector or of allowing it to be diluted or pushed around. I think that, certainly in their pronouncements, its business circles now are not so derisive or critical of the public sector as they used to be, because our public sector now is gaining ground and is improving in production, in cutting down the losses and so on. We are convinced that it must continue to occupy the commanding heights of our economy. But I must continue to stress that its production and performance have to be further improved by the adoption of more efficient methods of management and also by drawing upon the enthusiasm of workers to a much larger extent. 1

1. Quoted from R.K. Nigam: Social Justice Through Public Sector, (1976), Delhi, page 53.

It is significant to mention that the profits of the public enterprises in India have improved in a very spectacular manner in the last three years even while the politico-economic situation has progressively deteriorated. The gross profits before tax went up from Rs. 1,720 million in 1971-72 to Rs. 4,650 million in 1974-75. The gross profits for 1975-76 were estimated to be around Rs. 8,500 million.²

These figures, of course, do not prove that the public enterprises are more efficient and properly run than the private sector enterprises. In order to make a comparison of performance, we need to know the net return on the investment, which obviously calls for details of the investment made, interest, taxes and depreciation that are to be deducted from the gross profits.

It is encouraging, however, that some public enterprises in India are at least making some profits and others are paying their own way. This is not to say that profit should be considered as the main criterion to judge whether a public enterprise is efficient or not. A public enterprise may be efficient, but may record losses or low profits because of public policies that overtly or covertly require operations at low prices. For example, a railway's pricing structure may lead to losses under social

2. Ibid., page 58.

pressures. On the other hand, a public enterprise with the monopolistic power can make a high profit not necessarily through efficiency but through market conditions.

A Colloquium on Public Corporations and the Legal Systems of India, Indonesia, Malaysia and Sri Lanka was held in Colombo in 1974, which has suggested that:

one aim of the public sector is to produce a financial surplus. A continuing deficit cannot be explained away in terms of competing social aims. Moreover, for an enterprise to operate at a continuous loss may be demoralizing, erode financial discipline, and lead to adverse public criticism of the public sector. 3

The Colloquium has also pointed out that:

the criteria to be applied in a particular case will depend upon the type of public enterprise. Profit-making may not always be an appropriate test of efficiency: If the enterprise is a monopoly, profit maximization could be due to exploitation, or high profits might be the result of high prices. 4

3. International Legal Center: Law and Public Enterprise in Asia, (1976), page 17.

4. Ibid.

It is appropriate to mention that the White Paper on the Nationalised Industries, which was published by the Government of the United Kingdom in March 1978, has said that:

It is essential that the mistakes of the early 1970s should not be repeated. The Government intends that the nationalised industries will not be forced into deficits by restraints on their prices. When help has to be given to poorer members of the community, it will be given primarily through the Social Security and taxation systems and not by subsidising nationalised industry prices. 5

Nyerere has also admitted that "profit is necessary whether an enterprise is privately or publicly owned." 6

We maintain that enterprises which provide public services should always aim to run at a profit and build up reserves, and the reserves in turn, should be used for their own expansion. Prices should not be artificially held down by subsidising the public sector products, because when a good is subsidised it does not help the poor in whose interests the policy is adopted as the benefit of the subsidy goes to all consumers irrespective of size of income.

5. The White Paper on the Nationalised Industries, H.M.S.O., (1978), page 22.

6. The Economist, March 1978, page 11.

However, it is very clear from Mrs. Gandhi's statement that the public sector undertakings occupy a pivotal role in India's economic strategy:

I think we can say with justifiable pride that the sinews of our strength, though it may be modest by the standards of the advanced countries, lie largely in our public enterprises. We have to create a new atmosphere in the country to give a certain feeling to our people that all those who are involved in the public enterprises are deeply involved and deeply committed. This is the sort of atmosphere which has to be created in our public enterprises. 7

On the other hand, President Nyerere of Tanzania is no less enthusiastic than Mrs. Gandhi to establish a Socialist society through Socialist policies. He is a believer in Socialism. He stated: "At independence we achieved political control, now is the appropriate time for us to secure the control of our economy". 8

Nyerere believes that:

7. A Hand Book of Information on Public Enterprises (1970), (Ministry of Finance), Delhi, page XI.

8. J.K. Nyerere: Freedom & Socialism, page 262.

to build and maintain socialism,
it is essential that all the major
means of production and exchange
in the nation are controlled and
owned by the peasants through⁹
the Government machinery.

This statement suggests the willingness and the readiness of the government to participate in the management of its own economy so as to ensure that the people of the country are able to decide development plans as well as obtain a large portion of the profits.

Nyerere has stressed that:

the Government has also as its principal aims to participate directly in the economic development of the country whenever possible, to exercise effective control over the principal means of production, to expedite collective ownership of all natural resources, to prevent exploitation of one person by another or one group by another, to prevent the accumulation of wealth which is inconsistent with the existence of a classless society.¹⁰

Thus, Tanzania's decision to use public enterprise was considered an effective instrument for economic development and as a key in the

9. J. K. Nyerere: Ujamaa: Essays on Socialism, page 116.

10. *Ibid.*, page 14.

transition to Socialism. It is significant, however, that Tanzania's public enterprises have not achieved the same good record as India's public enterprises have.

The Economist has made quite pertinent comments: "The cost of Socialism has been in chronic inefficiency in both trade and industry and in the growth of an army of bureaucrats manning the plethora of State-Corporations - known in Tanzania as parastatals".¹¹

The rate of growth has fallen more sharply as a whole; from an average of 6.8 per cent a year in 1964-67, it has dropped to 4.0 per cent in 1967-75. In 1974, it was actually negative.¹²

Nyerere also admitted:

Almost all our industrial plants are running well below capacity; sometimes less than 50 per cent of what it could be produced with existing machinery is actually being manufactured and put on to the market. Even Tanzania Breweries was only using 68 per cent of its capacity in 1975; Tegry Plastics ran at 46 per cent capacity; and the Mara Milk Plant at less than 30 per cent

11. The Economist, (London), 17 March, 1978, page 11.

12. *Ibid.*, page 112.

capacity. Our parastatals are not producing sufficient surplus to finance new investment. In 1967-74, only about 20 per cent of new productive investment was financed from the resources of the existing public owned corporations. They were not, in more common terms, making sufficient profit. For profit is necessary whether an enterprise is privately or publicly owned. Public ownership affects what happens to the profits, not the necessity for them. 13

The poor showing of the public enterprise in Tanzania could be attributed to many factors, for example, the dearth of capital (both foreign and indigenous), acute shortage of skilled personnel or efficient managers, the appointment of inefficient management, etc.

Professor Ghat has observed that:

Inquiries into the performance of public enterprise in various countries show a record of inefficiency, corruption and maladministration. There is often a lack of sense of responsibility among the officials of public enterprises. Public Corporations have not functioned as a form to draw persons with industrial and business expertise into the management of State enter-

prises; political leaders or civil servants – have been the key officials, and have lacked the necessary management skills. If the management and negotiating skills could be improved, both the internal and external defects could be ameliorated. 14

Our study entirely agrees with Professor Ghat's observations.

We have noted earlier that in India many ex-Ministers and ex-M.P.s have been appointed to the board of directors as part-time chairman and members, without considering their actual ability, efficiency and business acumen. In Tanzania as well, it has been pointed out by Shivji that a few principal Secretaries in some Government Ministries and departments, on average, held 13 leadership posts each in the parastatals. One would surely agree that, however efficient and able a person may be, it is physically difficult, if not impossible, to look into the affairs of so many parastatals and run them as efficiently as they should be run.

It is relevant to mention that Tanzania is trying to fill the vacuum in the field of administrative training such as administrators, accountants, etc. For example, Dr. Emery of the I.B.M. Corporation (sponsored by

14. Ghat, Y.P.: "Control and Management of the Economy", Research Perspective on Public Enterprise in VRU (1976), page 172.

the Ford Foundation) is now Management Development Adviser in the General Manager's Office of the National Development Corporation, and his primary responsibility is to establish a system for training Tanzanian managers.¹⁵ Shivji, however, has cast doubt as to whether the Capitalistic system of training would help the Tanzanian managers to run a Socialist economy or whether this would, in fact, reinforce the ideological ties with the Capitalist world. In Shivji's own words: "the training by the foreign partner is bound to leave behind the ethos of Capitalism, thus reinforcing the ideological ties with the Capitalist world".¹⁶

The Party, under the charismatic leadership of Nyerere, is still supreme today and its influence is felt at every level and in every corner of the country. Therefore, it is unthinkable at this moment of time that a handful of managers trained by an American expert would be able to destroy the basic foundation of the society which is so deep rooted and well established.

However, it is now expected that the economy of Tanzania may turn for the better as:

15. Shivji, I.G.: Class Struggle in Tanzania (1976), page 178.

16. Ibid., page 178.

the confidence of Astans has risen sharply in the past year and domestic savings are now mysteriously appearing and being invested. For instance, in the private sector, a new textile factory in Iringa, largely financed by Astans, reflects a new degree of optimism among a community that has hitherto felt insecure and beleaguered throughout East Africa, though it was at the same time a major source of commercial skill, middle-class savings and entrepreneurial activity. 17

17. The Economist, (London), 17 March, 1978, page 12.

8.2 Forms of Organisation

The three principal organisational types, both India and Tanzania have used, are the Government department, the public corporation and the company form. Generally, the earlier types of enterprises were concerned with public utilities, for example, railways, postal services, etc., and these were run by the Government departments. Certain criticisms have been levelled against this form of State participation, namely, that it is inflexible, therefore not suitable for commercial initiatives, that it is subject to Budget, accounting and audit controls applicable to Government activities, i.e. it has strict financial regulations and that its permanent staff consist of Civil Servants, therefore, it is too bureaucratic, and so on.

In order to overcome these shortcomings, public corporations were set up. These are created by special Acts of Parliament defining their objects, demarcating the powers, the management and the relations that will subsist between them. Each is a body corporate and can hence sue and be sued in its own name. Each ensures better accountability and each is easier to operate.

In India, however, there is only one kind of corporation, which is created separately by a separate Act of Parliament and is known as a

public corporation. In Tanzania, on the other hand, there are two types of corporation. One is set up by a specific Act of Parliament, which is known as a statutory corporation. The second type comes into existence by Presidential Order under Section 3 of the Public Corporations Act of 1969. This Act was passed in order to establish corporations just by the Presidential Order so that whenever a corporation needs to be set up for specific purposes, the Government does not have to go to the National Assembly. Most of the public corporations set up under the Public Corporations Act, 1969, have followed a similar pattern. The Act has also set out the manner in which corporations might be created.

As the public sector is expanding very fast in India, an Act similar to the Public Corporations Act would be convenient, and would save a lot of valuable time for M.P.s to discuss matters of national importance. However, at present, the establishment of a public corporation is an exception; creation of a company is the rule.

The company form has the advantage of much greater flexibility as the necessary adjustment can easily be made in the articles of association of a company. It is regarded as improper, for example, by Professor Robson, the Rangoon Seminar on Organisation and Administration of Public Enterprises, etc., for a company to be wholly owned by the Government. The company form may be used where an enterprise is to be started in

association with the private sector.

We strongly recommend that the wholly-owned government companies should be made statutory/public corporations, because parliamentary control is otherwise very much diluted by the creation of public enterprises by executive action, in which case Parliament has hardly any say whether the public funds should be invested in a certain public enterprise or not.

We also advocate greater private equity participation in the financing of public enterprises. We think it is desirable that private equity participation in the public enterprises should be encouraged as it not only diminishes the pressure on the Government's financial resources, but also enables public enterprises to work under the vigil of bodies of shareholders.

Having suggested this, it is also appropriate to mention what Professor Hanson, an eminent economist, had to say on the relative merits of different forms:

Practically every known type of public enterprise is to be found working well in some circumstances and badly in others, and it is extremely difficult to say what extent the performance of a particular enterprise has been affected by the form that the political authorities have given

It, as to isolate this factor from all the others is usually impossible. 18

Professor Dimock came to the conclusion that: "If sufficient improvements could be made among the departments in the direction of greater autonomy and flexibility, there could be little or not justification for public corporations at all." 19

The participants of the Colombo Colloquium are of the opinion that:

the choice of a particular form of public enterprise may not be significant because of other factors. For example, due to Ministerial interference, the operations of a public corporation may resemble those of a Government department. Nevertheless, the choice of a particular form should not be accidental or casual but should be preceded by a thorough appraisal of the relative advantages of using that form. 20

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18. A.H. Hanson: Public Enterprise and Economic Development, (1959), page 337.
 19. M.E. Dimock: "Government Corporations", American Political Science Review, Vol.XLIII, page 1163.
 20. International Legal Center: Law & Public Enterprise in Asia, page 13.

However, the purpose of State participation in a Socialist economy is to enjoy the fruits of an equitable society and to bring industries under public ownership so that greater government control can be exercised over them. Therefore, selection of the type of organisational form should depend on the nature of the State.

It is of interest to note that after the attainment of Independence, the Indian Companies Act of 1913 had been thoroughly overhauled and it was eventually repealed and replaced by the new Indian Companies Act of 1956 to suit the Indian conditions. This Act has provided a special section to deal with the government companies - the field which is expanding very fast. Whereas the Tanzanian Companies Ordinance (Cap.212), which was based on the English Companies Act of 1929, is still in force. The Companies Ordinance has had to be amended a number of times to accommodate government companies which are widely used for public enterprise.

We feel, therefore, that the Companies Ordinance is outdated and the time has come to pass a new Companies Act which should fulfil modern requirements. For example, the provision to deal with government companies, the treatment of directors' powers and of the duties of directors, appointment, qualifications and removal of Auditors, etc. should be inserted into the new Act. Alternatively, two forms of

company law may be created: (1) private company law, and (2) State company law. This would give State companies a separate status than that of private companies. But the distinction between corporations and companies would remain as the former are created by Acts of Parliament or Presidential Orders whereas the latter are created and governed by the provisions of the Companies Act. The Companies Acts, therefore, should be reviewed to develop more definite forms of public accountability, and a code of conduct should be set out to promote desirable social practices in industry. The right of the Government to inspect the accounts and operations would also be established. It would then be possible to distinguish the two types of company, and to ensure that government companies were fully accountable to the Government.

It is relevant to point out that one of the general characteristics of the public corporation is that it has no shares and no shareholders, either private or public. However, this principle has been violated in a number of cases, including the Industrial Finance Corporation (India), the State Bank of India and the Tanzania Investment Bank. In all cases some shares have been issued to institutions which, in turn, entitle such institutions to elect certain members of the Boards.

It is important now that certain issues, for example, the relationship between the Boards and Ministers, between the Boards and Parliament, etc., need to be settled in principle because these are issues which are closely linked with the problems of control, accountability and autonomy.

8.3 Relation between Management and Ministry

One of the main reasons of bringing in industry under public ownership is to exercise a measure of democratic control over it. This control ensures that the procedures and decisions which are adopted and taken by an enterprise, will be in the public interest. If there is no ministerial control, then public ownership becomes meaningless.

However, let us first explain the meaning of the three expressions, namely, Control, Accountability and Autonomy.

"Control" is an active function, a purposeful and positive activity. It means directing, restraining, stimulating a person or organisation to a certain action or end. "Accountability" is a passive function. It means and involves receiving accounts reports, statistics, etc. The person accountable is in the position of a trustee who has to give an account of how he has performed the functions of his trusteeship. Thus, the public enterprises are under the control of the Ministry and both of these in their turn, are accountable to Parliament for their performance.

The word "autonomy" means that one should be allowed to carry out one's functions without outside interference. All corporations carry with them an element of autonomy. Thus, a company may add to its membership and change its internal regulations, for example, articles

of association, without any specific authorisation of law. Therefore, the problem of striking a proper balance between these elements is an exceedingly difficult and delicate one.

A public corporation is normally set up by an Act of Parliament, or in Tanzania by a Presidential Order. Each public corporation has a collective leadership known as the "Board", the Chairman is usually appointed by the President in Tanzania, but the members are appointed by the responsible Minister. The Board's responsibility, however, is not to an annual shareholders' meeting but to the Minister and through him, to Parliament and the public.

It is recognised that the Boards require a large degree of independence in matters of current administration, for their efficiency as commercial undertakings. At the same time, it should be borne in mind that discretionary powers may be exercised for improper purposes, in disregard of relevant considerations, or with unreasonableness. Therefore, it is suggested that the acts and omissions of the boards are to be subject to review and control by the legislature and the judiciary. The commercial enterprises are expected to meet their working expenses, to pay interest on capital, to provide for the loss of capital due to wear and tear and obsolescence, etc. These considerations make a strong case for a high degree of independence of boards from Government control. However,

It cannot be denied that the public enterprises, in view of their size and dimension, and because their expansion programme, investment and employment policies, etc. usually affect the whole structure of the economy. Therefore, the nation must have some final power of control over them.

Hence, it can be seen that all statutes dealing with statutory and public corporations in India and Tanzania grant exclusive controlling powers to the Ministers. With the expansion of the public sector economy, it was considered desirable to arm the competent Ministers with necessary powers. The corporation's programmes often have to be geared into the operations of the rest of the economic structure of the country.

Ministerial control may be conducted through various devices. In addition to the power of appointment and removal, the statutes creating public corporations in India, gave the responsible Ministers powers to give the corporations directions of a general nature on matters appearing to them to affect the public interest (S.21 of the L.I.C. Act, 1956), whereas in Tanzania, the Acts establishing statutory corporations empowered the relevant Ministers to give directions which are usually of a general character. — but in the case of the public corporations, the President has the power to issue directions in regard to specific matters as well, (S.6 of the Public Corporations Act, 1969).

It is appropriate to mention here that the British White paper on the Nationalised Industries has pointed out that:

In the absence of powers to give specific directions, governments have had to rely on a process of persuasion. Because this has been informal, accountability for decisions has on occasions been blurred and this has caused friction and resentment. The Government considers that this situation should be avoided, and that it is wrong in principle that a Minister cannot statutorily intervene in specific matters of major importance subject to the approval of Parliament. The Government proposes that the present powers should be extended to remedy this deficiency by enabling the Minister to give a board either general or specific directions on matters which appeared to him to affect the national interest. 21

It remains to be seen what course of action India and Tanzania would take in respect of their statutory corporations.

However, it must also be emphasised that the autonomy granted by the statute should not be infringed. If interference is allowed, then the very object of establishing statutory corporations as autonomous bodies will be defeated.

21. The White Paper on the Nationalised Industries, (1978), page 11.

With regard to the relationship of the board of directors with the Ministers, we suggest that day-to-day administration should be independent of the executive. In matters of general policy, the boards must be subject to adequate ministerial control. The relevant Minister must take responsibility and be prepared to face up to responsibilities which he has assumed. He must be frank and realistic in his approach. This would be in the best and the ultimate interest of the nation he represents.

8.4 Parliamentary Control

The central feature of public accountability is often described as parliamentary control. This is based on the assumption that Parliament is the real representative of public opinion, that it is sovereign and has the final say in all matters. It is expected that in a parliamentary form of democracy which exists both in India and Tanzania, members of Parliament are entitled to know all about the public enterprises (not only how they are run, but also how the funds are utilised for the benefit of people at large. In other words, the public must have the last word in the control of the industries it owns). The Legislature as a body of elected representatives of the public is capable of being entrusted with this task.

Parliament uses three main instruments to exercise control over the public enterprise: (a) Questions, (b) Debates, and (c) Committee.

In India, an analysis of the parliamentary questions at the central level revealed that almost half the questions were devoted to operational problems, with about a third devoted to questions of appointments, more particularly the recruitment of various ethnic groups. The quality of discussions in State legislatures was even worse. 22

We would like to suggest to Indian parliamentarians to be more active to seek more information relating to public enterprise by pressing questions.

We will now comment on the working of the Committee on Public Undertakings and Standing Committee on Parastatal Organisations as an agency of parliamentary control over public enterprises. As noted earlier, there is no doubt that both the institutions, in India and Tanzania respectively, have done good work and contributed extensively to public knowledge on matters to which neither the Public nor Parliament has any access. It is pleasing to add that although the status of these committees is advisory, both the Governments consider seriously the recommendations of these Committees. These institutions should be given more powers, e.g. power to send for persons, papers and records, power to make special reports on any matter that comes to them in the course of its work, etc., and their recommendations deserve prompt action. Members either selected or elected must know all about the industry or industrial management so that the public can have respect for and confidence in them.

In Tanzania, a new body (i.e. the Inspectorate) has been established in accordance with the Parastatal Organisations (Finance, Supervision and Control) Act, 1975. The functions of the Inspectorate are:

- (1) to examine the expenditure of parastatal funds;

- (ii) to investigate the conduct and performance of officers who have access to the funds.
- (iii) to make recommendations and submit proposals to the Minister for ways and means of minimising unproductive expenditure of the funds, etc.

In India, the Bureau of Public Enterprises was set up in 1965 within the Ministry of Finance. The functions of the Bureau, inter alia, are:

- (i) to provide central point of reference, consultation and advice on important aspects of management of Public Enterprises.
- (ii) to explore all avenues of economy in the capital costs of the project;
- (iii) to devise steps to improve productivity and profitability of the enterprises.

"The Minister of Finance exercises his control through its Bureau, which is concerned in a coordinating capacity with all issues affecting all public enterprises".²³

If these institutions work effectively, they can exercise a great deal of control over the public enterprises.

23. Ibid., page 26.

In our opinion, it does not matter much by which parliamentary committee the activities of a public enterprise are examined and scrutinised. What matters is how such an agency functions in actual practice. Both Parliaments must examine more closely what type of parliamentary control would be more appropriate under their own conditions.

8.5 . Other Institutions

We would invite the Government of India to consider setting up an institution like the National Development Corporation of Tanzania, which has started as a joint venture, and now controls 100 companies and is considered as a key instrument of Government policy, and the National Enterprise Board of the United Kingdom. The National Enterprise Board is described as an instrument intended to secure, where necessary, large-scale sustained investment. It will hold all existing government shares in joint public-private firms, such as British Petroleum, as well as in companies which are wholly Government-owned, ⁱⁿ as the case of Rolls-Royce. India has an institution which might appear to be similar, known as the National Industrial Development Corporation, which was set up in October, 1954, with the object of financing industries and promoting industrial development. However, it does not buy or hold any shares of any companies. The main functions of the National Industrial Development Corporation are to (i) provide consultancy services through its Technological Consultancy Bureau, and (ii) formulate and execute projects for setting up new industries or developing new lines of production.

In another field (so far as the Office of the Parliamentary Commissioner for Administration is concerned), India is lagging far behind Tanzania, and the United Kingdom. The Permanent Commission of

Enquiry is providing a valuable service to the people of Tanzania. It is easily accessible and less expensive than going to Courts. It deals with complaints of any nature against any institution. The striking difference between the Ombudsman in the United Kingdom and the Permanent Commission of Enquiry is this: that an individual in Tanzania can make a complaint direct to the Permanent Commission of Enquiry, whereas in the United Kingdom, an individual has to go through his own Member of Parliament. At present, the Ombudsman in the United Kingdom only deals with the complaint made against any Government department. India has also established the Office of the Lokpal, which is equivalent to the Office of the Ombudsman. But it has a long way to go to establish its popularity and credibility.

8.6. Judicial Control

As corporate bodies, all statutory/public corporations and government companies are subject to the ultra-vires doctrine. Hence, the Courts can ensure that an enterprise restricts its activities which it is authorised to do. The Courts have legal power to intervene if it exceeds its limits. However, judicial control is possible only where corporate powers are accurately defined.

For example, the objects of Air India are defined as follows:

the Corporation, in particular,
have power -

- (a) to operate air transport-service, or any flight by aircraft for a commercial service or other purpose, and to carry out all forms of aerial work;
- (b) to provide for the instruction and training in matters connected with air craft or flight by aircraft of persons employed, or desirous of being employed, either by the Corporation or by any other person;
- (c) to acquire, hold or dispose of any property, whether movable or immovable, or any air transport undertaking;
- (d) to enter into and perform all such contracts as are calculated to further the efficient performance of its duties and the exercise of its powers under this Act;

- (e) to take such steps as are calculated to extend the air transport services provided by the Corporation, whether within or without India, including the development of feeder services and the improvement of the types of aircraft used in air transport services;
- (f) to take such steps as are calculated to promote the interests of the Corporation or to improve the services the Corporation may provide, including provision of catering, rest-rooms, goods-sheds, warehouses, and transport by land or water in connection with any air transport service or any other amenity or facility;
- (g) to take all such steps as may be necessary or convenient for, or may be incidental to, the exercise of any power, or the discharge of any function or duty conferred or imposed on it by this Act. 24

This provision can be given a very wide interpretation, and its construction is so subjective that the Courts might be hesitant to intervene. It is suggested, therefore, that some restrictions or qualifications ought to be placed on the "general powers" clause. In the absence of this, there will be very little and limited scope for judicial action.

24. S.7(2)(1), Air Corporations Act, 1953. See also S.4(2)(1) of the National Bank of Commerce Act, 1967.

8.7. Legal Services

An important innovation in the legal field is the creation of the Tanzania Legal Corporation set up under the Tanzania Legal Corporation (Establishment) Order of 1971. The Corporation was entrusted with the duty of providing legal services to 'parastatal organizations'. Such a type of institution does not exist in India. Professor Ghat has made the following pertinent remarks about the institution:

In Tanzania the establishing of the Legal Corporation to which all legal work of public enterprises has to be referred, has resulted in a gross reduction of business for the private bar, and has led to some form of socialisation of the legal profession. It has also forced a reconsideration of the question of the entire organisation of the legal profession, especially as the shrinking of the private bar also posed problems for the provision of defence counsel in criminal prosecutions. As for the effect on the enterprises, one may argue that when legal services are decentralised, whether through the private bar or in the individual enterprises, legal advice and interpretation tend to favour the interests of the enterprise and to justify its plans, and thus central control becomes difficult. On the other hand, if the legal services are centralised in an institution which is

subject to Government control, the lawyers do not identify themselves so closely with individual enterprises, and show more fidelity to central policy directives and laws, thus facilitating control of the enterprises by central agencies. It is also possible that such an arrangement reinforces the image of the lawyer as a technician and reduces his role to putting into "legal shape" decisions which have already been made. It is questionable whether this does not ultimately reduce fidelity to law. 25

Professor Ghat's balanced and critical analysis of the institution leaves little room to add any further comment except that the existence of such an institution will try to bring to an end any dispute between enterprises as quickly as possible, and thus ensure that the economic development is not any way hampered. Legal decisions through the Courts will unnecessarily delay progress and this is surely detrimental to the national interest. India may be tempted to establish an institution of this kind as the public sector is growing larger and larger.

The merits of establishing centralised legal service units were discussed by the Colombo Colloquium and reference was made in the discussion to the Tanzania Legal Corporation, which provides legal services

25. Ghat, Y: "Control and Management of the Economy: Research Perspectives in Public Enterprise", in VRU (1976), page 183.

to all public enterprises. The Colloquium has noted the following reasons for the establishment of the Corporation:

- (i) It was more economical for the government than the payment of large consultancy fees to private practitioners;
- (ii) It was felt that the private sector was not effectively providing adequate legal services to the public enterprises;
- (iii) the private legal profession was largely non-African;
- (iv) the Legal Corporation was viewed as a means of bringing about a measure of control over the work of public corporations;
- (v) It was felt that while lawyers identified with a Corporation are likely to serve primarily that enterprise, an external group is likely to be more faithful to the dictates of national law and policy.

They have also pointed out that the Service (Legal) had a strong impact on the structure of the legal profession. Many private law firms in Tanzania collapsed as a result of the withdrawal of corporation work. 26

The Government of India has not taken any decision yet either way.

8.8. Workers' Participation In Management

The acceptance of the idea of workers' participation in management in Tanzania has perhaps a slightly better chance of success than in India.

The party is everything in Tanzania, and is becoming everything plus. Its influence is felt at every level, in every corner of the country: in village councils, in secondary school selection committee, in factory workshop, as well as in Parliament, over which the new Constitution makes it supreme. One would expect, therefore, that the ideologies would be in the ascendant. ²⁷

As Tanzania is constitutionally a single-party State, the inter-union rivalry is non-existent. The Presidential Circular has made it compulsory to set up the Workers' Committee and the Workers' Council in every public corporation, enterprise, firm or parastatal organisation. It ^{is} usually expected that under a one-party State, the attitude of the management towards worker-directors would be sympathetic and the board officials would work together with a common goal, as most of the members belong to the same party.

27. The Economist (London), 17 March, 1978.

However, Shivji has pointed out that:

the Workers' Councils and executive Committees, institutions established officially to effect workers' participation, are composed in such a way that they are effectively controlled by members of the 'bureaucratic bourgeoisie'. The membership of the Workers' Committees which are officially established as organs for disciplining workers and not participation, is exclusively confined to the workers. 28

On this view, there is a deep-rooted class struggle in Tanzania.

As long as it will continue to be so, even the one-party State still will be unable to pave the way for a successful workers' participation. This unhappy situation was confirmed by Mr. Mwanjisi, the Principal Secretary in the Ministry of Labour and Social Welfare, who vigorously complained against this:

Following ... uneasiness in industrial relations, the Government would very soon redesign the roles of the Workers' Committees, Workers' Councils and TANU branches based in industrial premises. The Workers'

28. Shivji, I.: Class Struggles in Tanzania, (1976), page 132.

Committees were originally set up to handle disciplinary problems but they are now sacking managers, he said. The Workers' Councils, intended to be boards of governors from the inside, were now handling disciplinary matters. They should, he went on, confine themselves to over-²⁹ all planning and management.

As noted earlier, it is difficult to paint a rosy picture for India with respect to workers' participation in management. Firstly, in undertakings in the public sector, a bureaucratic frame of mind has often stood in the way of development of worker participation schemes. Secondly, as far as workers are concerned, the main problems are (i) inter-union rivalry; (ii) absence of a strong but responsible trade union movement, and (iii) lack of education. Thirdly, as far as the Government and employers are concerned, they must take positive steps to (i) reduce the present abnormal disparity in earnings between those at the top and those at the bottom; (ii) help the growth of a strong and responsible trade union movement, and (iii) encourage collective bargaining on a much larger scale than at present. However, a special responsibility rests on the more enlightened managements of the country. In time, workers' participation, to be really meaningful, must start at the lowest level. In view of the facts stated above, it is predictable however that India has a long way to go before

29. Ibid., page 133.

she can really and truly establish purposeful and effective boards in association with the workers of the country.

It is of interest to note that during the course of their discussion on the question of workers' participation in management, the Colombo Colloquium has made reference to the Tanzanian Presidential Circular, 1970, which directed that all parastatal organisations should establish Workers' Councils to provide for worker representation and participation in their executive committees and boards of directors. The Colloquium have observed:

In Tanzania, worker participation has not proved to be very effective either from the point of view of Socialist ideologists or that of the higher management. One of the principal goals of worker participation is to ensure Socialist solutions to problems of economic development and resolve the continuing contradictions between the working class and the managers. Although there have been some positive steps, such participation, on the whole, has not achieved the broader ideological goals that they were designed to achieve. The reason for this failure was largely due to lack of political consciousness among workers and party cadres in public enterprises. From the point of view of higher management,

workers have not yet had sufficient education or acquired enough competence to assume the managerial roles. 30

30. International Law Center: Law and Public Enterprise in Asia, page 32.

8.9. Conclusions

Since Independence, the growth of public enterprises has been rapid in India as well as in Tanzania. The purposes for which they have been created include, inter alia, such important matters as social security, development of river valley projects and nationalised road transport, civil aviation, insurance and banking, etc. Both countries have committed to Socialism and the public enterprise has emerged as an important instrument for achieving that end.

The role of public sector in India and Tanzania is large and expanding. Therefore, a central controlling institution is needed to ensure that an enterprise's policy decisions are consistent with the general economic policy of the government. Otherwise, decisions taken by an individual enterprise may be detrimental to the national interest.

James and Ligunya have observed:

there is an inherent tendency for each corporation to serve its own interests before those of the nation, for management to enhance its real impact by the often greater psychological impact of such features as prestigious headquarter buildings and intensive advertising campaign; for the commercial profit motive to derogate from that of full benefits to the nation for which the enterprise is created. At the level of

specifics, there are instances of decisions unfavourable to the national interest but favourable to the supra-national partner. Many building and management agreements concluded by parastatals fall into this category. More recently, a number of parastatals have given way to sectoral interests, e.g., that of their workers. Instances of the latter are the recent decisions of N.B.C., B.A.T. and Tanzania Breweries to distribute their profits to their employees as bonuses, proportionate to the workers' gross national income. 31

To remedy this situation, the idea of a 'Ministry of Public Enterprises' was put forward by some authorities.³² In the United Kingdom, the Select Committee on Nationalised Industries had recommended to establish a Ministry of Nationalised Industries in 1968.³³

The Government replied that:

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31. James & Ligunya: Organisational Relationships and the Control of Parastatals in Tanzania, in E.A.L.R. (1972), page 60.
 32. Ibid., page 61. They have discussed in the above article the countries which have adopted the centralisation of control through central agency.
 33. For a detailed discussion, see L. Tivey (Ed.): Nationalisation in British Industry (1973).

they do not believe that the establishment of a Ministry of Nationalised Industries responsible for the efficiency of those industries, but not for sector policy, would reduce intervention in the management of the industries, as the Select Committee hope and expect. They, however, take the view that a department responsible for all nationalised industries and all relevant sectors would be too diverse and too large. If the choice between the two methods of organisation has therefore to be made, the government consider that organisation by sectors is to be preferred. 34

With regard to the idea of a Ministry of Nationalised Industries,

Professor Hanson had this to say:

The most generally accepted pattern of ministerial responsibility for public enterprise is that which gives each enterprise to the Minister within whose sphere of jurisdiction it naturally lies. Thus, the Minister of Industry is responsible for all industrial enterprises, the Minister of Agriculture for all agricultural enterprises, the Minister of Finance for all State banks, etc. Obviously, there are

34. Ibid., page 238.

possibilities of conflict here and in marginal cases it may not be easy to say whether Minister A or Minister B should be given the responsibility. Such problems can be solved by putting all public enterprises under one Minister, but as a permanent arrangement this is hopeless, particularly as the public sector becomes fairly extensive. Significantly, most of the countries that once adopted it have now abandoned it. 35

We also believe that as the public sector in India and Tanzania is vast and complex, the establishment of a 'Ministry of Public Enterprises' would not be very effective. It is appropriate to mention that the Colombo Colloquium did not even take any interest to put this subject on the agenda for discussion.

There are other areas where we feel the statutes should be more specific and precise in order to avoid any tensions or misunderstanding.

James and Lingunya have pointed out that:

Ex post controls (i.e. supervision exercised by the parent ministry, the President, Parliament, etc.) cause tensions between the parastatal organs and the controlling agencies with

35. Quoted from James and Lingunya's article, page 61.

possible erosion of the autonomy of the parastatal which is the very *raison d'être* of this organisational form.³⁶

It is suggested, therefore, that the relevant statute should state as clearly as possible the legal relationship that will exist between the boards and the Ministers and the Legislatures.

Expressions such as "to act on business principles" and "national interest" are found in the L.I.C. Act, 1956, S.6(3), (Indta), the I.F.C. Act, 1948, S.6(2), (Indta), etc., should be defined as simply as possible. The statutes must state clearly who is responsible to interpret the 'national' interest. If the intention is that the judgment of the Minister should ultimately prevail over the commercial judgment of the boards, then the statutes should specifically mention this in order to clear the air of uncertainty.

It is also desirable to suggest that public enterprises ought to improve their annual reports in both countries. To the public and Parliament, the annual reports provide information on a continuous basis, which helps in judging the enterprise's performance. But the annual reports are hardly impressive. Essential information with regard to the sufficiency and quality of output, the cost of production, the rate of that production

36. Ibid., page 63.

and the rate of that reduction of the cost of production, etc. should be provided. They should also provide adequate comparisons with past years so as to reveal long-term trends.

We would like to draw the attention of leaderships of both countries to the proposals set out in the British White paper on the Nationalised Industries for their considerations.

It sets out proposals designed to reconcile the purposes of public ownership with the independence needed for vigorous and enterprising management, and to ensure that the nationalised industries employ resources efficiently to the benefit of the whole community.³⁷

Finally, we recommend that the Board of Directors should consist of men of competence, integrity and general wisdom.

37. The White Paper on the Nationalised Industries, (1978), page 5.

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